

No. 20-3371

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

DONALD J. TRUMP FOR PRESIDENT, INC. ET. AL,
Plaintiffs-Appellants,

— v. —

**KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA; ET. AL,**
Intervenor-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA - CIVIL ACTION NO. 20-CV-02078-MWB

**EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS UNDER FRAP 8
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY
INJUNCTION PENDING APPEAL TO STAY EFFECT OF
CERTIFICATION AND EXPEDITED RESPONSE**

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I. PRELIMINARY STATEMENT¹

Plaintiffs-Appellants seek a temporary restraining order and preliminary injunction based on the proposed Second Amended Complaint to stay the effect of Defendants' likely certification of the 2020 Presidential election. The District Court's denial of Plaintiffs' Motion to File a Second Amended Complaint is the subject of this appeal. Plaintiffs do not seek to enjoin the certification of any other Pennsylvania election.

Plaintiffs request expedited briefing pursuant to Local Rule 4.1 with Defendants' response due at 5:00 p.m., November 24. Defendants do not agree to expedited briefing or the relief sought.

Standard for Relief

This motion turns on the established preliminary injunction standard and the federal Constitution. While deciding the injunctive relief questions may “involve the resolution of litigation challenging the constitutional authority of [state and county election officials ... courts cannot avoid their responsibility merely ‘because the issues have political implications.’” *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Instead, “the Judiciary has a responsibility to decide cases properly before it.” *Id.* at 194. Put simply, federal courts have a “virtually unflagging obligation”

¹ Exhibits are being separately filed. All emphases are added, and citations, quotation marks, footnotes, and brackets are omitted, unless otherwise stated.

to exercise the jurisdiction provided by Congress. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 813 (1976).

Pennsylvania Mail Ballot Requirements

The Constitution gives state legislatures the exclusive power to determine how states will appoint members of the electoral college. In Pennsylvania, electors are awarded to the winner of the state’s popular vote. Accordingly, election officials must count every *lawful* ballot, while ensuring that every *unlawful* ballot is cast aside. *Carson v. Simon*, 2020 WL 6335967, *7 (8th Cir. Oct. 29, 2020). What distinguishes a lawful ballot from an unlawful one flows from Pennsylvania law. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (*per curiam*) (“When the state legislature vests the right to vote for President in its people, the right to vote *as the legislature has prescribed* is fundamental.”). Election officials have no discretion to depart from the legislatures’ directives, and they must apply the ballot security and integrity requirements *equally* throughout the Commonwealth.

The Pennsylvania legislature recently amended its election procedures to allow citizens to vote in person or by mail. After careful deliberation, the legislature retained and enumerated specific requirements for mail-in ballots, including (beyond the filled-out ballot), an inner secrecy envelope, a filled-out declaration, a signature, a date, and a complete address. Ballots that do not comply with these requirements are unlawful and must not be counted. The Pennsylvania Supreme Court so held

before this election, rejecting the notion that these provisions were merely “directory”:

To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements . . . [developing a] procedure to alleviate that risk is one best suited for the Legislature.

Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).²

Summary of Argument

First, Plaintiffs are likely to succeed on their appeal that the Court erred in denying their Motion to Amend. Further, Plaintiffs are likely to succeed in their merits claims that Defendants engaged in an intentional scheme to count mail ballots that did not comply with Pennsylvania law to favor Joseph Biden over President Donald J. Trump under *Marks v. Stinson*, and the numerous cases on which it was based, including *Reynolds*. In addition, Plaintiffs are likely to succeed on their Due Process and Equal Protection claims for intentionally counting defective mail ballots in order to favor Biden or Trump under *Marks v. Stinson*.³ Plaintiffs are likely to

² Plaintiffs understand that the Pennsylvania Supreme Court may have ruled today to allow these deficiencies despite clear Pennsylvania law and its 2020 precedent to the contrary, in plain violation of *Bush v. Gore*, changing longstanding law in the middle of a Presidential election. Counsel has not had sufficient time to study today’s rulings.

³ Plaintiffs’ Due Process claims were expressly included in the original Complaint and in the proposed Second Amended Complaint. These claims are premised, in part, on two Pennsylvania Supreme Court decisions, *i.e.*, *In re November 3, 2020 Gen. Election*, 2020 Pa. LEXIS 5560 (Pa. Oct. 23, 2020) (holding mail ballots may not be challenged on Election Day despite a provision to the contrary), and *In re*

succeed on their Due Process and Equal Protection claims that Pennsylvania's mail ballot scheme, without the right to meaningfully observe or challenge deficient mail ballots during the canvassing, is so porous that it is unconstitutional under *Reynolds* and *Griffin*.

Second, Plaintiffs will suffer irreparable harm if the limited relief sought – a short stay of certification (or its legal effect if certification has already occurred) – is not provided since the relief will not interfere with the appointment of electors for the candidate who has won the most legal votes before the December 8 safe harbor provided by 3 U.S.C. §5. In short, it would be unconscionable to allow Pennsylvania to certify electors for Biden and then have it turn out that Trump won the race.

Third, the balance of harm favors Plaintiffs. The Trump Campaign will be irreparably harmed if the results are certified and electors are appointed for Biden when the Trump Campaign ends up winning the vote, given the uncertainty of how to remedy electors who are improperly appointed before December 8.

Finally, the public interest is served by a short stay which harms no-one while this Court considers Plaintiffs' appeal on denial of the Motion to Amend and the District Court's decision on remand. The public demands that the winner of the *legal*

Canvassing Observation, No. 30 EAP 2020 (Pa. Nov. 17, 2020) (rendered on November 17, 2020, which disallowed meaningful observation of the canvassing of mail ballots).

votes – free of the shroud of Constitutional violations committed by Defendants – be awarded Pennsylvania’s electoral votes.

In sum, by November 23, 2020, the Defendant Boards of Elections are expected to certify to Defendant Secretary Boockvar results of an invalid and constitutionally infirm election process before this case can be heard on its merits. In turn, Secretary Boockvar is likely to certify the Commonwealth-wide election results and Plaintiffs may be deprived not only of their constitutional rights but also of a meaningful remedy. Under Fed.R.Civ.P. 8, Plaintiffs ask this Court for an injunction staying the legal effect of certification to prevent any unjust outcome, pending resolution of this appeal and the District Court’s decision on their Injunctive Relief Motion on remand. Plaintiffs propose expedited proceeding on the merits that will conclude before December 8, the safe harbor date for appointing electors under 3 U.S.C. §5. If Plaintiffs do not prevail, Defendants will not suffer any harm. If Plaintiffs succeed, Defendants – which are all government entities – have no legitimate interest in certifying invalid election results.

II. PROCEEDINGS BELOW

On November 19, 2020, Plaintiffs filed the Renewed Injunction Motion to bar Defendants from certifying the election until further order of Court. (ECF 182).

Defendants responded 5 p.m. on Friday, November 20. Plaintiffs' Reply was filed by Noon on November 21. (ECF 198).⁴

On Saturday evening, November 21, the Court granted Defendants' motions to dismiss the Amended Complaint and denied Plaintiffs' Motion to Amend without Defendants even responding, *solely* on the basis that "amendment would unduly delay resolution of these issues" concerning the certification of the election. The Court noted amendment would involve "a new briefing schedule, conduct a second oral argument, and then decide these issues." *Id.* It did not find bad faith, dilatory motive, prejudice or futility. The Court denied the Renewed Injunction Motion as moot. (Opinion, Exh. 11, ECF 202; Order, Exh. 12, ECF 203)

III. BACKGROUND

A. The Election Code

Pennsylvania law mandates putting each ballot in an inner secrecy envelope, which shall then be placed in the second [envelope], on which is printed

the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

⁴ On November 18, Plaintiffs filed the Motion for Leave to File the Second Amended Complaint (ECF 172), attaching the proposed Second Amended Complaint (Exh. 10 ECF 172-2) with a Supplement filed at (ECF 185).

25 Pa. Stat. Ann. §3150.16.

After officials receive the mail-in ballots, the law requires them to “safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.” 25 Pa. Stat. Ann. §3146.8(a). Election officials may “pre-canvass” ballots “no earlier than seven o’clock A.M. on election day,” but “[n]o person observing, attending or participating in a pre- canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.” 25 Pa. Stat. Ann. §3146.8(g)(1.1).

To provide due process protection, “[w]atchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are *opened* and when such ballots are *counted* and recorded.” 25 Pa. Stat. §3146.8(b). Working together, these provisions ensure that mail-in ballots are not manipulated, tampered with, or even inspected until election day; that no one can *open* or *count* ballots without a poll watcher present; and that even if someone pre-canvasses a ballot on election day, no one can be told “the results” of that pre-canvass until polls close.

B. Defendants Violate Pennsylvania Law

Secretary Boockvar has long advocated state officials should count more mail ballots than the law allows, knowing this would favor Biden over Trump. For instance, on September 28, 2020, she issued guidance to the County Boards of

Elections that mail-in and absentee ballots returned without inner secrecy envelopes should be counted.⁵ That guidance directly contradicted the mandatory language in Pennsylvania’s Election Code, which is why the Pennsylvania Supreme Court struck it. *See Pa. Democratic Party*, 238 A.3d 345 (Pa. 2020) (“[T]he Legislature intended for the secrecy envelope provision to be mandatory.”)⁶

Despite the clear commands of the Election Code, Secretary Boockvar and the other Defendants systematically disregarded key ballot integrity and security measures associated with mail-in votes. As the Second Amended Complaint details, Defendant County Election Boards engaged in a scheme to count absentee and mail ballots which should have been disqualified. (SAC ¶252) The Trump Campaign was provided no meaningful access or actual opportunity to review and assess mail-in ballots during the pre-canvassing meetings in order to favor Biden over Trump. (SAC ¶4) Sometimes, no watchers were permitted at all. Other times poll watchers were permitted for only some periods, or were required to stand so far away that they could not tell which ballots were improperly counted. The Defendant County Boards have continued ignoring Pennsylvania law, and some have just days

⁵See Guidance Concerning Civilian Absentee and Mail-in Ballot Procedures, 9/28/2020 (Exh. 2).

⁶ The law is clear: “If any of the [secrecy] envelopes . . . contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein **shall** be set aside and declared void.” 25 Pa. Stat. Ann. §3146.8(g)(4)(ii).

ago voted to count thousands of ballots with incomplete addresses, no signature, and other deficiencies.⁷ In addition, Secretary Boockvar's Naked Ballot Guidance was issued in order to encourage the counting of mail ballots which she knew would favor Biden. (SAC ¶¶98) County Election Boards also proceeded to pre-canvass mail-in ballot envelopes prior to Election Day in order to favor Biden over Trump. (SAC ¶¶139)

C. Pennsylvania Supreme Court Decisions in Violation of *Bush v. Gore*

Subsequent to the filing of the original Complaint, the Pennsylvania Supreme Court ruled in a five to two partisan decision that parties and candidates have no right to meaningfully observe the canvassing of mail ballots. *In re Canvassing Observation*, No. 30 EAP 2020 (Pa. Nov. 17, 2020). This inexplicable decision denying the right of meaningful observation was on the heels of *In re November 3, 2020 Gen. Election*, 2020 Pa. LEXIS 5560 (Pa. October 23, 2020) which *sua sponte* declared that the provision of the Pennsylvania election code which provided for challenging mail ballots by observers on election day, 25 P.S. §3146.8(f), was

⁷ See Meeting of the Commissioners of Elections (Nov. 9, 2020) (Exh.3) (Philadelphia County voted to count many thousands with no date, street address, or printed name); Election Day Updates (Nov. 12, 2020) (Exh. 4) (Allegheny County voted to count thousands of undated ballots); In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, ¶¶22–23(Exh. 5)(Bucks County voted to count ballots with no date and others with no printed name or address, a mismatched address, or other errors).

invalid. As a result of these last minute decisions on the eve of the Presidential election, Pennsylvania no longer allows meaningful observation or challenges to mail ballots which do not comply with Pennsylvania law before they are mixed with other ballots, opened, and counted. It is hard to imagine an election scheme which is more porous and violative of Due Process than this – ballots mixed, opened, and counted without any ability to trace them without observation and challenge. Under *Bush v. Gore*, 531 U.S. at 98, this Court may independently interpret Pennsylvania law and not sustain these decisions which altered the law in the middle of a presidential election.

D. The Pennsylvania Supreme Court Decisions Violate Due Process

Given Defendants implemented these decisions, Pennsylvania law is so porous in not allowing the observation and challenging of mail ballots that it violates basic due process regarding free and fair elections. *See Marks v. Stinson*, 19 F.3d at 887 (due process violation from “massive absentee ballot fraud, deception, intimidation, harassment and forgery, [and] many of the absentee votes were tainted”); *Griffin v. Burns*, 570 F.2d 1065, 1074-79 (1st Cir. 1978) (due process violation in refusal to count absentee and shut-in ballots state officials had offered to voters); *Common Cause Georgia v. Kemp*, 347 F.Supp.3d 1270, 1293-99 (N.D. Ga. 2018) (for due process violation, granting injunctive relief to “ensure that provisional ballots cast by eligible registered voters ... [were] properly counted”

based on “statistical evidence as well as additional sworn declarations of poll watcher and voters” and extending certification deadline two days to allow for ballot counting).⁸

E. *Marks v. Stinson* Approved Proof Procedure

Plaintiffs engaged a statistical expert to determine the number of mail ballots that were improperly counted based on statistically significant sampling of the 1.5 million cast in the Defendant Counties once they are produced by Defendants and reviewed by counsel. This procedure of sampling and statistical analysis was approved by the Court in *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), which observed:

Courts, with the aid of expert testimony, have been able to demonstrate that a particular result is worthy of the public's confidence even though not established solely by applying mathematics to the record evidence. *See e.g. Curry*, 802 F.2d at 1317-19. What is required is evidence and an analysis that demonstrate that the district court's remedy is worthy of the confidence of the electorate.

Id., at 889, f.n. 14.

⁸ *See also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (sustaining due process challenge where “voters were denied the right to vote because their names were missing from the rolls,” “[p]oll workers improperly refused assistance to disabled voters,” and “[p]rovisional ballots were not distributed to appropriate voters”); *Bonas v. Town of N. Smithfield*, 265 F.3d 69 (1st Cir. 2001) (due to failure to hold election required by town charter “disenfranchisement of the electorate” in violation of due process”); *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. Sep. 1981) (refusal to call special election required by state law due process violation).

This principle was applied by the District Court on remand in relying on statistical evidence in removing Stinson and placing Marks in a Pennsylvania state Senate seat by excluding illegally cast mail-in ballots and finding Marks won the election. *See Marks v. Stinson*, 1994, U.S. District LEXIS 5273 (E.D. Pa. April 26, 1994).

Prior to any hearing, if granted expedited discovery, Plaintiffs will examine these envelopes to determine the percentage of mail ballots that were illegally counted – of which Biden won approximately 75% and Trump 25%, a 50% margin for Biden. Plaintiffs, through statistical expert analysis, will then extrapolate this percent to the 1.5 million mail ballots. This simple exercise will determine whether Plaintiffs can prove their case – *i.e.*, that sufficient *illegal* ballots were counted that changed the election result.⁹ If so, the District Court should set aside these votes and declare Trump the winner. In the interim, the legal effect of any certification should be stayed until the District Court can rule if this appeal is granted.

IV. LEGAL STANDARD

A. Fed.R.Civ.P. 8(a)

⁹ For example, if 10% of the 1.5 million mail ballots were improperly counted because they lacked signatures, dates, or inside security envelopes, 75% x 150,000 votes should be deducted from Biden, and 25% x 150,000 votes should be deducted from Trump, a margin of 75,000 votes for Biden which would be sufficient to overturn reported results.

Plaintiffs satisfy Rule 8(a)(1)'s requirement to "move first in the district court for . . . an order . . . granting an injunction," by first requesting this preliminary injunction from the District Court, which was denied without an evidentiary hearing or opinion. *See* Opinion, Exh. 11 and Order, Exh. 12.

B. Temporary Restraining Order and Preliminary Injunction

"Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

A temporary restraining order "is a stay put, equitable remedy that has [as] its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation." *Fres-Co Sys. United States v. Hawkins*, 2016 U.S. Dist. LEXIS 199343, at *3, n.1 (E.D. Pa. Aug. 26, 2016) (internal quotations and citations omitted). The temporary restraining order standard mirrors the familiar test for a preliminary injunction. *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 592 (E.D. Pa. 2012). A movant need only demonstrate "(1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief." *Bimbo Bakers USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010).

A sufficient showing on the first two factors can suffice:

As a court sitting in equity, the District Court’s task was to weigh the four factors, but it was not incumbent on [movant] to prevail on all four factors, only on the overall need for an injunction. A sufficiently strong showing on either the likelihood of success or irreparable harm may justify an injunction, though a petitioner’s showing on the other factors may be lacking.

Neo Gen Screening, Inc. v. TeleChem Int’l, Inc., 69 F. App’x 550, 554 (3d Cir. 2003).

The first factor – “likelihood of success” – means “a reasonable chance, or probability, of winning” but it “does not mean more likely than not.” *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011)(*en banc*). The second factor – “irreparable harm” – requires Plaintiffs to show “that [they are] more likely than not to suffer irreparable harm in the absence of preliminary relief.” *Holland v. Rosen*, 895 F.3d 272, 286 (3d Cir. 2018) (quoting *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017)). In the election context, “[t]he counting of votes that are of questionable legality ... threaten[s] irreparable harm.” *Carson*, 2020 WL 6335967, at *7 (quoting *Bush v. Gore*, 531 U.S. at 104).

V. ARGUMENT: THE COURT SHOULD STAY THE LEGAL EFFECT OF CERTIFICATION

“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. at 104 (emphasis added).

Plaintiffs assert that Defendants not only failed to administer the 2020 Presidential Election in compliance with the manner prescribed by the legislature, but Defendants violated Plaintiffs’ equal protection and due process rights in order to favor Biden over Trump. Unless any legal effects of certification are stayed, Plaintiffs may be left with no remedy because Pennsylvania’s electoral votes for President and Vice President may be awarded to someone else.¹⁰

A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR APPEAL OF THE DISTRICT COURT’S DENIAL OF THE MOTION TO AMEND

The District Court abused its discretion in denying Plaintiffs’ Motion to Amend. Fed.R.Civ.P. 15 commands that leave to amend shall be “freely granted;” yet the District Court denied the Motion to Amend without even assessing its merits, for the sole reason that grant of leave to amend would cause “undue delay”– without there ever having been a judicial determination that the “result” certified is the legally correct result. Plaintiffs’ Appeal Brief addresses the reasons that the District

¹⁰ Given the District Court has the power to decertify the electors before December 8, 2020, the statutory safe harbor date for appointing state electors, this Court may stay any legal effect of certification in the event that Defendants have already done so, pending the District Court’s ruling on the Renewed Injunction Motion if this Appeal is granted. *See, e.g., Marks v. Stinson, supra; Krieger v. Peoria*, 2014 U.S. Dist. LEXIS 117235, *10-15 (D.Ariz. Aug. 22, 2014) (granting TRO and holding that Defendants shall not count certain votes and, instead, shall hold a special election where “plaintiffs have shown a likelihood of success on the merits of their constitutional claims [b]ecause an election based in part on incomplete ballots that omit a candidate’s name [is] fundamentally unfair”).

Court was in error and provides the basis that there is a likelihood of success on this issue. In short, the District Court's decision without review of the merits of the Motion to Amend flies in the face of the Supreme Court's dictate in *Bush v. Gore* that "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." 531 U.S. at 108. That holding could not possibly be more directly applicable here.¹¹

B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS¹²

To make out this first factor, "the plaintiff need only prove a *prima facie* case, not a certainty that he or she will win." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 173 (3d Cir. 2001). This Court has held that "a sufficient degree of success for a strong showing exists if there is a 'reasonable chance, or probability, of winning.'" *In re Revel AC, Inc.*, 802 F.3d 558, 568-69 (3d Cir. 2015) (quoting *Singer*, 650 F.3d 223). Plaintiffs make that showing based on the Proposed Second Amended Complaint.

¹¹ *Bush v. Gore* imposed remedies in light of a deadline for action by the Electoral College that is commanded by federal statute – 3 U.S.C. §5. *See* 531 U.S. at 110. The November 23 state law certification date viewed by the District Court is nothing of the kind; indeed, the District Court identified no reason why delay of certification would be problematic in any way.

¹² While the focus of this argument is on the Trump Campaign, the individual Plaintiffs, Pennsylvania citizens and voters, have the right not to have an election decided by illegal votes.

In short, Defendants violated the Equal Protection Clause and Due Process Clause of the Constitution by counting votes that were unlawful under the Pennsylvania Election Code in order to favor Biden over Trump. Article II of the Constitution provides that the rules for Presidential elections be established by each state “in such Manner as the Legislature thereof may direct.” U.S. Const. art. II §1, cl. 2. Where, as here, the legislature has enacted a specific election code, “the clearly expressed intent of the legislature must prevail.” *Bush v. Gore*, 531 U.S. at 120 (Rehnquist, C.J., concurring). If the constitutional text were not enough, a Supreme Court majority explained that it would not defer to a state court’s interpretation of an election code because a law “enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors” is a federal constitutional question “under Art. II, §1, cl. 2, of the United States Constitution.” *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000).¹³

Pennsylvania law mandates that mail-in ballots meet detailed requirements. *See* 25 Pa. Stat. Ann. §3150.16. These include a secrecy envelope, which

shall then be placed in the second [envelope], on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such

¹³ This view is not novel. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (explaining “the words, ‘in such manner as the legislature thereof may direct’ ... operat[e] as a limitation upon the state in respect of any attempt to circumscribe the legislative power”).

envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Id.

“Shall” means shall, the requirements are mandatory, and ballots that fail to meet them should not be counted. There is every reason to believe the number of defective ballots is in the tens of thousands - *more than 37,000 mail-in ballots were rejected under these rules in the primary, which had far fewer voters*. See <https://www.npr.org/2020/08/22/904693468/more-than-550-000-primary-absentee-ballots-rejected-in-2020-far-outpacing-2016>. Plaintiffs have sought expedited discovery to obtain access to the 1.5 million mail ballots cast in the Defendant Counties – or a statistically significant sample – in order to prepare their evidence, including expert evidence, to determine the number of defective mail ballots which were counted.¹⁴ See Motion to Expedite Discovery (ECF 171).

1. Defendants Violated the Equal Protection Clause to Favor Biden over Trump

¹⁴ Of course, there is nothing improper about not counting improperly cast votes. Only legal votes should be counted. *Cf. Bush v. Gore*, 531 U.S. at 119 (Rehnquist, C.J., concurring) (“No reasonable person would call it ‘an error in the vote tabulation,’ ... or a ‘rejection of legal votes,’ ... when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify.”)

First, Defendant County Election Boards, controlled by Democrats, engaged in a scheme to count mail ballots which should have been disqualified, knowing it would overwhelmingly favor Biden because of the registrations of persons who voted by mail and the strategies of the competing campaigns. (SAC ¶¶168, 177, 179, 194, 223, 252, 253) As a result, Defendant County Election Boards deliberately favored Biden, effectively stuffing the ballot box in his favor with illegal votes in violation of *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273, *aff'd*, 19 F.3d 873. *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote.”); *Snowden v. Hughes*, 321 U.S. 1, 11 (1943) (“Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.”)

Second, Defendant County Election Boards provided political parties and candidates, including the Trump Campaign, no meaningful access or actual opportunity to review and assess mail-in ballots during the canvassing of mail ballots in order to favor Biden over Trump. (SAC ¶4)

Third, Defendant County Election Boards failed and refused to set aside and challenge defective ballots resulting in the arbitrary, disparate, and unequal treatment between those who vote in-person at the polling place versus those who

vote by absentee or mail-in ballot – all designed to favor Biden over Trump. (SAC ¶¶110, 112, 117)

Fourth, Secretary Boockvar’s Naked Ballot Guidance was issued in order to “encourage the counting of mail ballots which she knew would favor Biden.” (SAC ¶98) Following the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party*, 2020 Pa. LEXIS 4872 (Pa. Sep. 17, 2020), which ruled that the secrecy provision language in Election Code Section 3150.16(a) is “mandatory,” Boockvar removed the Naked Ballot Guidance from the Pennsylvania Department of State’s website, but did not issue guidance advising all 67 County Election Boards to not count non-compliant absentee or mail-in ballots. (SAC ¶¶99-100)

Fifth, certain Democratic controlled Defendant County Election Boards proceeded to pre-canvass mail-in ballot envelopes prior to Election Day to favor Biden over Trump. In Philadelphia County, election officials examined ballots in advance of Election Day, identifying those that might be rejected. (SAC ¶¶139-141) Many voters were told ahead of time to cast a provisional ballot on Election Day.¹⁵ By contrast, most counties followed Secretary Boockvar’s October 21 guidance and did not erect such an illegal voter “assistance” program.¹⁶

¹⁵ See, e.g., Murray Decl.(Exh. 6); Hetak Decl.(Exh. 7).

¹⁶ See, e.g., Chew Decl.(Exh. 8); Leinbach Decl.(Exh. 9). On November 2 Deputy Secretary Jonathan Marks sent a general email suggesting that such contacts occur “during the pre-canvass” (meaning on election day). Jonathan M. Marks Email (Nov.

Sixth, statistical analysis is expected to evidence that over 70,000 mail and other ballots which favor Biden were improperly counted – sufficient to turn the election – a remedy expressly applied in *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273, at *78, later affirmed. (SAC ¶18)

Finally, Defendants violated the Equal Protection Clause because as a result of their conduct to obscure access to the vote-counting process, watchers in Allegheny, Philadelphia and other Defendant Counties did not have the same right as watchers in Republican controlled Pennsylvania Counties, such as York, to be present when envelopes containing official absentee and mail-in ballots were reviewed, opened, counted, and recorded. (SAC ¶56) While apparently facially neutral, it was designed to prevent the Campaign and Republican watchers from uncovering the deliberate scheme to favor Biden over Trump.

2. Defendants Violated The Due Process Clause To Favor Biden over Trump In A System Which Was So Porous So As to Violate Due Process on Its Face

“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote.” *Reynolds*, 377 U.S. at 555. Due process is implicated “[i]f the election process itself reaches the point of patent and fundamental

2, 2020)(Exh. 1). In no way did this email suggest it was legal to manipulate or tamper with mail-in ballots prior to election day to determine their validity and offer voters advice on provisional voting.

unfairness.” *Griffin v. Burns*, 570 F.2d at 1077. *See also Marks v. Stinson*, 19 F.3d at 888 (“[R]ejection of a ballot where the voter has been effectively deprived of the ability to cast a legal vote implicates federal due process concerns.”) Defendant County Election Boards intentionally and purposefully discriminated in to favor presidential candidate Biden over Trump by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to count defective ballots, violating Due Process. (SAC ¶252)

Numerous decisions have sustained due process challenges to elections involve documented instances of improperly cast ballots and the failure to properly count cast ballots. *See Marks*, 19 F.3d at 887 (due process violation from “massive absentee ballot fraud, deception, intimidation, harassment and forgery,” and “many of the absentee votes were tainted”); *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2005) (“election officials refus[al] to tally absentee ballots ... may violate the voters' constitutional rights.”); *Griffin*, 570 F.2d at 1074 (due process violation where state refused to count “the absentee and shut-in ballots that state officials had offered to the voters”); *Krieger v. Peoria, City of*, 2014 U.S. Dist. LEXIS 117235, at *16 (“an election based in part on incomplete ballots ... likely violates Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment.”)

Here, given the Pennsylvania Supreme Court’s decisions that Pennsylvania

law does not allow meaningful observation of the canvassing of mail ballots and the opportunity to object before they are opened and the ballots mixed together and counted, it is so porous that it violates basic due process and the Due Process Clause regarding free and fair elections.

3. Defendants Should Bear the Burden of Proving the Mail Votes Were Legal

Defendants excluded Trump and Republican watchers from meaningfully observing the canvassing, thereby ensuring that Plaintiffs would not have immediate means of showing the legal *vis-à-vis* illegal votes. Even worse, the Pennsylvania Supreme Court held that there is no right to meaningful observation, *In Re Canvassing Observation*, and no right to object to deficiencies on mail ballots before they are opened and counted, *In Re November 3 General Election*. On its face, this system is so porous as a matter of law to violate Due Process under *Reynolds*, *Griffin*, and *Marks*. In this situation, Defendants should have the burden of proving the mail votes were legal. *See, e.g., Warf v. Bd. of Elections*, 619 F.3d 553, 561-62 (6th Cir. 2010) (“once the contestant has made a showing of irregularity, ... contestee must then come forward with evidence of substantial compliance with balloting procedures”); *Wilkes-Barre Election Appeals*, 1967 Pa. Dist. & Cnty. Dec. LEXIS 9, *16 (Pa.Com.Pl. Luz. Cnty. Dec. 27, 1967) (concluding that where “challenger has presented a *prima facie* case to substantiate his challenge [to absentee ballot,] ... the burden of proof shifted to the voter to establish her position.”)

C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF

The irreparable nature of the harm to the Plaintiffs is apparent. If the Pennsylvania vote count – including unlawful ballots – is certified and not stayed to permit meaningful review, the electoral votes will be awarded to Biden. If Plaintiffs later prove that the election was invalid, unfair, unequally administered, and included the tabulation of unlawful mail-in ballots, their victory will be Pyrrhic.¹⁷

D. THE BALANCE OF HARMS FAVORS PLAINTIFFS

The balance of harms favors Plaintiffs. Plaintiffs seek a short stay, and not past December 8, to preserve the *status quo* while this case proceeds. Defendants will bear little harm so long as they certify by December 8, the federal safe-harbor date. If Defendants prevail by or before that date, the same electors will be appointed with ample time to vote in the Electoral College. If Plaintiffs prevail, it can only be because Defendants had no legitimate interest in certifying a constitutionally flawed outcome. Either way, Defendants will not suffer harm from a slight delay. By

¹⁷ To the extent Defendants have certified the election, numerous cases sustain decertification as a remedy. However, given the uncertainty as to how this may be effected, relief should be provided now. *See, e.g., Marks v. Stinson*, 19 F.3d at 887 (upholding district court order invalidating election tainted by “massive absentee ballot fraud, deception, intimidation, harassment and forgery”); *Griffin*, 570 F.2d at 1077 (“There is precedent for federal relief where broad-gauged unfairness permeates an election...”); *Kreiger*, 2014 U.S. Dist. LEXIS 117235, *15-16 (enjoining defendants from counting votes and ordering new election where the “fundamental unfairness [was] more than isolated.... [T]he defective ballots in this case were mailed to approximately one-half of voters.”).

contrast, Plaintiffs may lose their opportunity for meaningful relief entirely if the legal effect of certification is not stayed, since it is not clear what remedies would remain after that point once electors are appointed. “How strong a claim on the merits is enough depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.” *Reilly*, 858 F.3d at 179 (*quoting Hoosier Energy Rural Elec. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009)). The low costs on Defendants and high potential harm to Plaintiffs make this a case with substantial “net harm an injunction can prevent.”

E. THE PUBLIC INTEREST IS FURTHERED BY ENTRY OF INJUNCTIVE RELIEF

The Third Circuit has recognized that the protection of the voting and associational rights of political parties, their candidates, and their potential supporters is an important right that meets the public interest test for injunctive relief. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997). Plaintiffs’ challenge is important to all those who will vote in Pennsylvania’s elections in the future. “[G]ranted the preliminary injunction is in the public interest [T]he United States Supreme Court has observed: ‘[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.’” *Pierce*, 324 F. Supp. 2d at 707 (*quoting Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). “Because of the importance that each elector’s

vote count to the same extent as other electors in other counties, it is in the public interest to grant a limited preliminary injunction.” *Id.*

VI. CONCLUSION

Extensive evidence exists that Defendants mis-administered the 2020 Presidential Election in such a disastrous manner that they violated the Equal Protection Clause and structural guarantees of our Constitution in order to favor Biden over Trump. And Defendants blocked Plaintiffs’ attempts to meaningfully observe and document their actions at almost every turn. This mal-administration reached the point of patent and fundamental unfairness and evidences an intentional attempt by Defendants to jeopardize both the ability of Pennsylvanians to select their leaders and the constitutional rights of all Plaintiffs. This Court should stay the vote certification pending this appeal, otherwise Plaintiffs may be without a way to remedy the severe, innumerable constitutional violations.

Respectfully submitted:

Dated: November 23, 2020

/s/Marc A. Scaringi

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United States Court of Appeals for the Third Circuit

**Corporate Disclosure Statement and
Statement of Financial Interest**

No. 20-3371

Donald J. Trump for President, et. al.,
Plaintiffs-Appellants

v.

Kathy Boockvar, et. al.,
Defendants-Appellees

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Donald J. Trump for President, Inc.
makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:
NONE.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Brian C. Caffrey
(Signature of Counsel or Party)

Dated: November 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of November 2020, I filed a copy of
the foregoing

**PLAINTIFFS APPELLANTS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

which will serve all parties registered to receive same.

/s/Marc A. Scaringi

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Exhibits to Emergency Motion for TRO – PI

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Exhibit 1

Carter, Allen T.

[REDACTED]

[REDACTED]

----- Forwarded message -----

From: **Melissa Hazell Davis** <MDavis@griesinglaw.com>

Date: Tue, Nov 3, 2020 at 9:10 AM

Subject: Fwd: [External] RE: Important DOS Email - Clarification regarding Ballots Set Aside During Pre-canvass

To: linda@lindakernslaw.com <linda@lindakernslaw.com>

Melissa Hazell Davis

Sent from my iPhone

From: Hangley, Michele D. <mdh@hangley.com>

Sent: Tuesday, November 3, 2020 9:09:46 AM

To: 'Melissa Hazell Davis' <MDavis@griesinglaw.com>

Subject: FW: [External] RE: Important DOS Email - Clarification regarding Ballots Set Aside During Pre-canvass

WARNING: This email originated outside of the Firm. DO NOT CLICK links or attachments unless you recognize the sender and are expecting the email.

From: Marks, Jonathan <jmarks@pa.gov>

Sent: Monday, November 2, 2020 8:38 PM

To: Marks, Jonathan <jmarks@pa.gov>

Subject: Important DOS Email - Clarification regarding Ballots Set Aside During Pre-canvass

Importance: High

Dear County Election Directors,

The Department of State has been asked whether county boards of elections can provide information to authorized representatives and representatives of political parties during the pre-canvass about voters

whose absentee and mail-in ballots have been rejected. The Department issued provisional ballot guidance on October 21, 2020, that explains that voters whose completed absentee or mail-in ballots are rejected by the county board for reasons unrelated to voter qualifications may be issued a provisional ballot. To facilitate communication with these voters, the county boards of elections should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected and should promptly update the SURE system.

Kind regards,

Jonathan M. Marks

Deputy Secretary for Elections & Commissions

Pennsylvania Department of State

302 North Office Building | Harrisburg, PA 17120

☎ 717.783.2035 📠 717.787.1734

✉ jmarks@pa.gov



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Exhibit 2

TLP: WHITE



GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

Date: September 28, 2020

Version: 1.0

GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES

1 MAIL-IN AND CIVILIAN ABSENTEE BALLOTING – GENERAL PROVISIONS

Qualified voters may apply at any time on or before 5:00 p.m. on the Tuesday before any primary or election for a mail-in or civilian absentee ballot, and county boards of elections must begin processing applications at least fifty (50) days before the primary or election. County boards of elections may process applications earlier than fifty (50) days before the primary or election, if the county board of elections determines that it is better for its operational needs to do so.

1.1 WHO MAY REQUEST AN ABSENTEE OR MAIL-IN BALLOT?

All qualified voters in Pennsylvania are eligible to vote by mail-in ballot, and no excuse is required. For example, even if a voter will be present in their municipality on Election Day, but would simply prefer to vote from home, they may request a mail-in ballot.

Absentee ballots may be voted by domestic voters who will be absent from their municipality on Election Day due to work or vacation, voters who are celebrating a religious holiday, and voters such as college students who also may be away from the municipality on Election Day, if they don't choose to vote where they go to school. Absentee ballots are also for those who are unable to attend their polling place due to illness or physical disability.

A voter may only qualify for and vote one ballot.

2.2 Permanent Voter Lists

Any qualified voter can request to be placed on the permanent **mail-in** voter list at any time.

For the permanent annual **absentee** ballot list, only voters with a permanent illness or disability are eligible; this section does not apply to voters expecting to be absent from the municipality. Absentee voters who request to be placed on the permanent absentee list do not have to renew their physician's certification of continued disability every four (4) years or list it on each application.

If voters wish to request to become an annual permanent voter:

- For annual permanent **mail-in** list requests: these requests may be submitted when completing their online mail-in ballot request application.
- For annual permanent **absentee** list requests: this may be submitted by paper application only due to the physician's certification requirement.

Each year the county must send an application to any voter on the permanent absentee and mail-in voter lists by the first (1st) Monday in February. The yearly application, once approved, serves as a standing request for a mail-in or absentee ballot to be mailed to that voter for every election that calendar year and for any special election until the third (3rd) Monday in February the next year.

If a permanent mail-in or permanent absentee voter no longer wishes to receive a ballot for the upcoming election or wishes to cancel her permanent status, the voter can submit a cancellation form to the county board of elections. The cancellation form can be found at [VotesPA.com](https://www.votespa.com).

2 REQUESTING AN ABSENTEE OR MAIL-IN BALLOT

There are three (3) ways by which voters can apply for mail-in or absentee ballots:

1. By Mail
2. In Person
3. Online

2.1 MAIL REQUESTS

A voter may submit a paper application via mail to the county board of elections for absentee and mail-in ballot applications.

2.2 IN-PERSON (OVER THE COUNTER) REQUESTS

Act 77 of 2019 allows voters to request and cast an absentee or mail-in ballot over the counter in advance of Election Day. After ballots are finalized by a county, voters may apply at a County Election Office (CEO) during established business hours to receive and cast a mail-in or absentee ballot in person while the voter is in the office.

Once the voter is determined to be qualified and the application for an absentee or mail-in ballot is approved, the county board of elections **must promptly present** the voter with the voter's mail-in or absentee ballot. Under Section 1305 of the Election Code, 25 P.S. § 3146.5, a county board of elections may not deny the eligible voter's request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application. Voters still need to provide proof of identification (as defined in the Election Code) to be verified by county boards of elections to vote an absentee or mail-in ballot. Proof of identification for civilian absentee and mail-in voting include a valid driver's license number, the last four digits of the voter's social security number or other valid photo identification.

Voters who receive a mail-in or absentee ballot in person must be provided an opportunity to privately and secretly mark their ballot. **Note:** *The marking of the ballot in secret does not have to take place in the election offices. It can be provided in a nearby location.*

2.2.1 Satellite County Election Offices

County election boards may provide for mail-in and absentee application processing and balloting at more than one location within county borders.

Counties may establish additional business hours for CEOs; hours do not have to be limited to weekdays or to typical business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience for voters.

When a county decides to provide additional mail-in and absentee balloting by establishing additional CEOs, the county must account for all of the following:

- Each CEO must be staffed by appointed elections personnel in municipal or county-owned or leased locations selected by the county board of elections for processing applications and in-person voting of both mail-in and absentee ballots.
- Each CEO must have a secure county network connection that is capable of connecting to the Statewide Uniform Registry of Electors (SURE), and staff trained and approved to access SURE. NOTE: The Department will work with counties to establish secure connections; the county network extension must be approved by the Department.
- Each CEO must either have copies of all ballot styles available to be voted in the county, or an on-demand ballot printer capable of printing all ballot styles available to be voted in the county.
- Each CEO must have a secure ballot collection receptacle to store voted mail-in or absentee ballots submitted at the location. County boards of election are required to keep voted ballots in a sealed or locked container until the time of pre-canvassing.
- Please see the Department of State's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance on choosing a location for a CEO.

2.3 ONLINE REQUESTS

A voter may submit either an absentee or mail-in ballot request online via the Department's online portal at PA Voter Services.

Online applications must be processed according to the same statutory requirements as an application submitted by-mail or in person, including the proof of identification requirements defined in the Election Code.

3 DELIVERY OF MAIL-IN AND ABSENTEE BALLOTING MATERIALS

Counties must begin delivering mail-in or absentee ballots as soon they are certified and available. Counties may await the outcome of pending litigation that affects the contents of the ballots, but in any event the county must begin delivering mail-in or absentee ballots no later than the 2nd Tuesday prior to Election Day.

Once the counties begin delivering their ballots, as additional applications are received and approved, the county must deliver or mail ballots to such additional voters within forty-eight (48) hours of receipt of approved applications.

3.1 BALLOTING MATERIALS

The absentee and mail-in balloting materials must include the following:

1. The voter's proper ballot style based on the voter's registration address.
2. A white, inner (or "secrecy") envelope that indicates official ballot.

3. A pre-addressed outer ballot-return envelope that contains a declaration which the voter must sign and date.

The ballot must be returned within the inner envelope, which must be placed in the pre-addressed outer envelope.

With regard to the inner envelope:

- The Pennsylvania Supreme Court held on September 17, 2020, that any ballot that is not returned in the official ballot envelope (secrecy envelope) must be set aside and declared void. These ballots have been referred to as “naked ballots.” In accordance with that ruling, all ballots that are not returned within the inner envelope must be set aside and may not be counted. ***Counties are strongly encouraged to include an instructional insert which describes how the voter should mark and return their ballot and to clearly warn that ballots must be returned in the secrecy envelopes or they will not be counted.*** The Department encourages county boards of election to publicize the requirement that ballots must be returned within the inner envelope, including on the county’s website, in their offices, at ballot collection sites, and in other locations that may assist and educate voters.
- If any voted ballot’s inner (or “secrecy”) envelope contains any text, mark, or symbol which reveals the identity of the voter, the voter’s political affiliation (party), or the voter’s candidate preference, the envelopes and the ballots inside them must be set aside, declared void and may not be counted.

With regard to the outer ballot-return envelope:

- A ballot-return envelope with a declaration that is filled out, dated, and signed by an elector who was approved to receive an absentee or mail-in ballot is sufficient and counties should continue to pre-canvass and canvass these ballots.
- A ballot-return envelope with a declaration that is not filled out, dated, and signed is not sufficient and must be set aside, declared void and may not be counted. Ballot-return envelopes must be opened in such a manner as not to destroy the declarations executed thereon.
- All ballot-return envelopes containing executed declarations must be retained for a period of two years in accordance with the Election Code.

3.2 BALLOT DESIGN REQUIREMENTS

Act 12 of 2020 changed the law with respect to the surrender process for voters who request mail-in or absentee ballots.

Pursuant to Act 12 of 2020, a warning notice is required to be listed on both the absentee and mail-in ballots, which states:

WARNING: If you receive an absentee or mail-in ballot and return your voted ballot by the deadline, you may not vote at your polling place on election day. If you are unable to return your voted absentee or mail-in ballot by the deadline, you may only vote a provisional ballot at your polling place on election day, unless you surrender your absentee or mail-in ballot and envelope to the judge of elections to be voided to vote by regular ballot.

4 RETURN OF BALLOTS BY VOTERS

4.1 VOTER MUST RETURN OWN BALLOT

A voter must return his or her own completed absentee or mail-in ballot by 8:00 pm on Election Day to the county board of elections or other county-designated drop-off location. Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability who have designated in writing an agent to deliver their ballot for them. Agency forms may be found at VotesPA.com. Emergency absentee ballots also may be delivered by a designated agent.

4.2 COLLECTION OF MAIL-IN AND ABSENTEE BALLOTS

In addition to the main CEO and satellite CEOs, counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots. ***Please refer to the Department's August 19, 2020 Absentee and Mail-In Ballot Return Guidance for more information and guidance regarding ballot collection locations and procedures.***

County boards of election are required to keep absentee and mail-in ballots in a sealed or locked container(s) until the time of pre-canvassing.

4.3 SURRENDER PROCESS FOR VOTERS WHO REQUEST MAIL-IN OR ABSENTEE BALLOTS

Once a voter requests a civilian absentee or mail-in ballot, they should vote and return that mail-in or absentee ballot by mail, or deliver it in person to a county elections office (CEO) or other designated drop-off location prior to 8:00 P.M. on Election Day.

However, if a voter has not voted their mail-in or absentee ballot, they may take it to their polling place on election day to surrender it. (NOTE: This is a different procedure than was in place for the June 2020 primary. Act 12 of 2020 changed the procedures for voters who request mail-in or absentee ballots, but later appear at their polling place. These changes take effect for the first time in the November 2020 General Election.)

Specifically, a voter who requests a mail-in or absentee ballot and who is not shown on the district register as having voted the ballot may vote at their polling place on Election Day if (1) the voter surrenders the original mail-in or absentee ballot and its outer envelope to the judge of elections to be spoiled, and (2) the voter signs a statement subject to the penalties under 18 Pa. C.S. § 4904 in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot and the envelope containing the declaration of the elector to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

If the voter turns in (surrenders) his or her ballot and outer envelope and signs the statement, the voter is permitted to vote by regular ballot at the polling place.

If a voter whose record in the district poll book indicates that the voter requested a mail-in or absentee ballot but the voter does not surrender their ballot and declaration envelope and sign the required statement, the voter should be provided a provisional ballot. Even if the voter asserts that they did not cast a mail-in or absentee ballot and is eligible to vote, the voter should only be provided a provisional ballot.

5 ABSENTEE AND MAIL-IN VOTING PROCESSES FOR COUNTY ELECTION OFFICIALS

5.1 POLL BOOK PROCESSES

The poll books will be divided into two sections.

The main section will include a) voters who have not requested a mail-in or absentee ballot for this election and b) voters who requested an absentee or mail-in ballot but who did not return their ballot by the date the pollbooks were printed. There will be a special watermark in the poll book indicating that voters who did not return their ballot by the date the pollbooks were printed must either surrender their ballot as described in Section 4.3 above or vote provisionally if they appear at the polling place on Election Day.

The secondary section of the pollbook will contain a list of voters who have both requested and returned their ballot (cast their vote) by the time the poll book was printed.

Voters who requested but have not returned their absentee or mail-in ballot may vote in person at their polling place on election day ONLY if they surrender their ballot and the declaration envelope that accompanies it, as described in Section 4.3 above. The poll worker shall take the surrendered ballot and declaration envelope and mark them as "VOID." There is a location in the poll book where the poll worker must indicate that the items were surrendered. The voided ballot and declaration envelope, and the signed surrender declaration should be placed in a secure envelope or container and returned to the county election office with other polling place materials at the end of the voting day. The surrendered ballot materials must be preserved.

As noted above, the poll book record for voters whose cast absentee or mail-in ballot has already been received will indicate that the voter's ballot was cast and they are not eligible to vote at the polling place. This will aid poll workers when checking in voters to easily determine that these voters are not eligible to vote on the voting equipment but may vote provisionally if the voter believes they are eligible to vote.

The watermarks in the poll books as listed above also apply to voters with a permanent flag on their voter record. In either case, the poll worker will be able to determine the appropriate course of action when reviewing the poll book on election day.

5.2 PRE-CANVASSING AND CANVASSING ABSENTEE AND MAIL-IN BALLOTS

The Act 12 of 2020 amendments provide for a pre-canvass period beginning on the morning of Election Day to canvass all ballots received prior to the pre-canvass meeting. The amendments further provide for a canvass meeting beginning no earlier than the close of polls to canvass all ballots not included in the pre-canvass meeting.

Pre-canvass Meeting

- The **pre-canvass** may begin no earlier than 7:00 AM on Election Day. County boards of election must provide notification of the time and location of a pre-canvass meeting at least 48 hours prior to the meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be pre-canvassed.
- One authorized representative for each candidate and one authorized representative for each political party must be permitted to remain in the room where the pre-canvass meeting occurs.
- Persons observing, attending or participating in the pre-canvass meeting MAY NOT disclose the result of any portion of the pre-canvass prior to the close of polls on Election Day.
- The Department strongly urges all counties to begin pre-canvassing at the earliest time allowed to ensure that results can be tabulated promptly.

Canvass Meeting

- The **canvass** of mail-in and absentee ballots may begin no earlier than the close of polls and no later than the 3rd day following the election. County boards of election must provide notification of the time and location of the **canvass** meeting at least 48 hours prior to the meeting by posting notice on its website.
- The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be canvassed.
- The canvass process must continue through the 8th day following the election to include valid military and overseas ballots received by 5:00 PM on the 7th day following the election.
- One authorized representative for each candidate and one authorized representative for each political party must be permitted to remain in the room where the canvass meeting occurs.
- The Department strongly urges all counties to begin canvassing at the earliest time allowed to ensure that results can be tabulated and reported promptly.

Pre-canvass and Canvass Procedures

At the pre-canvass or canvass, as the case may be, the county board of elections should:

- Segregate the unopened ballots of voters whose applications were challenged by the challenge deadline (5:00 PM on the Friday before the election).
 - These ballots must be placed in a secure, sealed container until the board of elections holds a formal hearing on the challenged ballots.
 - Ballot applications can only be challenged on the basis that the applicant is not qualified to vote.
- Set aside the ballot of any voter who was deceased before election day.

- Set aside any ballots without a filled out, dated and signed declaration envelope.
- Set aside any ballots without the secrecy envelope and any ballots in a secrecy envelope that include text, mark, or symbol which reveals the identity of the voter, the voter's political affiliation (party), or the voter's candidate preference.

The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis.

No challenges may be made to mail-in or absentee ballot applications after 5:00 pm on the Friday before the election.

No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.

NOTE: For more information about the examination of return envelopes, please refer to the Department's September 11, 2020 *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*.

###

Version History:

Version	Date	Description
1.0	9.28.2020	Initial document release

Exhibit 3

Meeting of the Commissioners - Elections
November 9, 2020

BOARD OF ELECTIONS
MEETING OF COMMISSIONERS

- - -

HELD ON: November 9, 2020

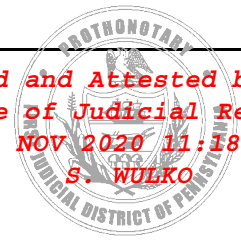
COMMISSIONERS: LISA M. DEELEY
AL SCHMIDT
OMAR SABIR

REPORTED BY: Angela M. King, RPR
(Via Zoom telephone)

- - -

STREHLOW & ASSOCIATES, INC.
FULL SERVICE COURT REPORTING AGENCY
54 FRIENDS LANE, SUITE 116
NEWTOWN, PENNSYLVANIA 18940
(215) 504-4622 FAX(215)504-7155
WWW.STREHLOWCOURTREPORTING.COM

Filed and Attested by the
Office of Judicial Records
10 NOV 2020 11:18 pm
S. WULKO



STREHLOW & ASSOCIATES, INC.
(215) 504-4622

Exhibit A

Case ID: 201100878
Control No.: 20110899

Meeting of the Commissioners - Elections
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1 (At this time, the proceedings commenced
2 at approximately 9:00 a.m.)

3 - - -

4 COMMISSIONER DEELEY: This is
5 November 9, 2020.

6 First, I have an announcement, the
7 Philadelphia City Commissioners met
8 virtually in Executive Session on Friday,
9 November 6, 2020 to meet with the Council
10 in order to discuss ongoing litigation
11 regarding the election.

12 We will now move to Public
13 Comments. Commenters shall state where
14 they live. Or if they are not a resident
15 in Philadelphia, that they are a
16 Philadelphia approximate. Public Comments
17 is not an opportunity for dialogue or Q and
18 A. It is Public Comments, a chance for you
19 to tell us what you think.

20 Each speaker shall have two
21 minutes. However, I may extend this time
22 at my discretion. All Public Comments must
23 be relevant or germane towards business.

24 Finally, it is my responsibility to

Meeting of the Commissioners - Elections
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1 preserve order and decorum of the meeting.
2 As such, profane, slanderous,
3 discriminatory or personal attacks will not
4 be tolerated.

5 Anyone wishing to offer Public
6 Comments, please, step forward.

7 Step forward.

8 MS. KERNS: My name is Linda Kerns.
9 I represent Donald Trump -- (audio fades
10 out.)

11 THE STENOGRAPHER: I can't hear at
12 all.

13 COMMISSIONER DEELEY: Wait, one
14 second.

15 THE CLERK: I'm going to go over to
16 the speaker so you can hear better.

17 THE STENOGRAPHER: Please.

18 Thank you.

19 COMMISSIONER DEELEY: Ms. Kerns,
20 can you please repeat your comment.

21 MS. KERNS: Sure. My name is Linda
22 Kerns. I represent Donald Trump. I just
23 needed to know the name of the court
24 reporter. I asked Mr. Bluestein. And he

Meeting of the Commissioners - Elections
November 9, 2020

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1 told me to direct my questions to you.

2 COMMISSIONER DEELEY: Thank you.

3 We will give you that information
4 after the meeting.

5 We will now hear a report from
6 Supervisor of Elections, Mr. Garrett Dietz.

7 MR. DIETZ: Good morning,
8 Commissioners.

9 COMMISSIONER DEELEY: Good morning,
10 Garrett.

11 COMMISSIONER SCHMIDT: Good
12 morning, Garrett.

13 MR. DIETZ: Before I get into the
14 ballots that I performed a secondary review
15 on, I just want to note that per the court
16 order from Election Day, we have confirmed
17 that Verna Phillips of Ward 36 Division 15,
18 did not submit a valid ballot.

19 THE STENOGRAPHER: Can you, please,
20 move closer to the speakers. I'm having a
21 hard time hearing.

22 THE CLERK: Okay. I'll put it
23 right up to the speaker.

24 MR. DIETZ: Now I will go through

Meeting of the Commissioners - Elections
November 9, 2020

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1 the various categories per my second level
2 review.

3 The first category is ballots with
4 a blank Declaration Envelope where it does
5 not appear that the voter attempted to
6 complete any of the information including
7 signature on the Declaration Envelope of
8 the ballot. There are 472 ballots in this
9 category.

10 COMMISSIONER DEELEY: I vote no
11 count.

12 COMMISSIONER SCHMIDT: I vote not
13 to count.

14 COMMISSIONER SABIR: I vote not to
15 count.

16 MR. DIETZ: Okay.

17 Category number two are ballots
18 where it appears that the voter did not
19 sign the Declaration Envelope.

20 COMMISSIONER DEELEY: How many of
21 those, Mr. Dietz?

22 MR. DIETZ: There are 225 ballots
23 in this category.

24 COMMISSIONER DEELEY: Thank you.

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1 I vote not to count.

2 COMMISSIONER SCHMIDT: I vote not
3 to count.

4 COMMISSIONER SABIR: I vote not to
5 count.

6 MR. DIETZ: Okay.

7 Category number three. There are
8 1,211 ballots in this category. This is a
9 category where the voter affixed their
10 signature to the Declaration Envelope, but
11 no other information was provided.

12 I should add that every ballot --
13 every ballot category I am going through
14 today was timely received by close of polls
15 on Election Day.

16 COMMISSIONER SCHMIDT: And how many
17 ballots are in this universe?

18 MR. DIETZ: 1,211 ballots.

19 COMMISSIONER DEELEY: Garrett, the
20 voters did sign -- there is a signature on
21 the Dec?

22 MR. DIETZ: Correct. The voter did
23 affix their signature.

24 COMMISSIONER DEELEY: I vote to

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1 count.

2 COMMISSIONER SCHMIDT: I vote not
3 to count.

4 COMMISSIONER SABIR: Garrett, can I
5 have a question.

6 Did the signatures match the list?
7 Did we check that?

8 MR. DIETZ: Per the directions from
9 the Department of State, we cannot verify
10 signatures against the system.

11 COMMISSIONER SABIR: I vote to
12 count.

13 MR. DIETZ: Okay.

14 Category number four. This is
15 where ballots were completed except for the
16 date of signature. So, the Declaration had
17 a signature. And they had the printed name
18 of the elector and the street address of
19 the elector.

20 COMMISSIONER DEELEY: And, Garrett,
21 how many of these ballots?

22 MR. DIETZ: 1,259 ballots.

23 COMMISSIONER DEELEY: And these
24 ballots were received timely?

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1 MR. DIETZ: Correct.

2 COMMISSIONER DEELEY: I vote to
3 count.

4 COMMISSIONER SCHMIDT: I vote not
5 to count.

6 COMMISSIONER SABIR: I vote to
7 count.

8 MR. DIETZ: Okay.

9 Category number five. Ballots in
10 this category were complete with signature,
11 date and street address and are missing the
12 printed name of the voter.

13 COMMISSIONER DEELEY: And how many
14 ballots were these, Garrett, in this
15 category?

16 MR. DIETZ: 533 ballots in this
17 category.

18 COMMISSIONER DEELEY: I vote to
19 count.

20 COMMISSIONER SCHMIDT: I vote to
21 count.

22 COMMISSIONER SABIR: I vote to
23 count.

24 MR. DIETZ: Category number six.

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1 Ballots in this category had the signature
2 of the voter as well as the date of
3 signature and the printed name of the
4 elector. It's missing the street address
5 of the voter.

6 COMMISSIONER DEELEY: And how many
7 of these were in this category?

8 MR. DIETZ: I should clarify when I
9 say missing street address, printed by the
10 voter specifically.

11 COMMISSIONER SCHMIDT: But the
12 street address is on the label?

13 MR. DIETZ: Correct. That's why I
14 wanted to make that distinction.

15 COMMISSIONER DEELEY: And,
16 Mr. Dietz, they are signed and dated?

17 MR. DIETZ: Correct.

18 COMMISSIONER DEELEY: And the
19 number?

20 MR. DIETZ: 860.

21 COMMISSIONER DEELEY: I vote to
22 count.

23 COMMISSIONER SCHMIDT: I vote to
24 count.

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1 COMMISSIONER SABIR: I vote to
2 count.

3 MR. DIETZ: Category number seven.

4 This is where the voter affixed
5 their signature to the Declaration Envelope
6 and provided the date of signing. However,
7 it is missing the printed name and the
8 street address specifically written in, in
9 hand, by the voter.

10 COMMISSIONER DEELEY: Garrett,
11 these ballots were received timely?

12 MR. DIETZ: Correct.

13 COMMISSIONER DEELEY: And the
14 number in this category?

15 MR. DIETZ: 4,466.

16 COMMISSIONER DEELEY: I vote to
17 count.

18 COMMISSIONER SCHMIDT: I vote to
19 count.

20 COMMISSIONER SABIR: So, these were
21 signed by the voter?

22 MR. DIETZ: Correct.

23 COMMISSIONER SABIR: I vote to
24 count.

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1 MR. DIETZ: Category number eight.
2 Ballots where the individual that
3 completed the Declaration appears different
4 than the elector who was assigned the
5 ballot. Using the label on the Declaration
6 Envelope to decide that.

7 There are 112 ballots in this
8 category.

9 COMMISSIONER DEELEY: Garrett, do
10 they indicate on this Declaration Envelope
11 a need for assistance?

12 MR. DIETZ: No.

13 COMMISSIONER DEELEY: Could you
14 repeat the number, please?

15 MR. DIETZ: 112.

16 COMMISSIONER DEELEY: I vote to not
17 count.

18 COMMISSIONER SCHMIDT: I vote not
19 to count.

20 COMMISSIONER SABIR: I vote to not
21 count.

22 MR. DIETZ: Category number nine.
23 Ballots that were not included in a
24 Secrecy Envelope.

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1 COMMISSIONER DEELEY: And, Garrett,
2 what is the number of ballots that did
3 not -- were not included in the Secrecy
4 Envelope?

5 MR. DIETZ: 4,027.

6 COMMISSIONER DEELEY: And were
7 those 4,027 received timely?

8 MR. DIETZ: Yes.

9 COMMISSIONER DEELEY: Were the Dec
10 Envelopes filled out accurately? Properly?

11 MR. DIETZ: It varies.

12 COMMISSIONER DEELEY: Thank you.

13 The naked ballot is a difficult one
14 for me. Since I have been a Commissioner,
15 we have always counted naked ballots.

16 I am aware of the recent Supreme
17 Court ruling concerning them and our
18 legislators failure to correct the matter.
19 I am pleased that the awareness campaign
20 leading up to the election, including the
21 work done by myself, Commissioners Sabir
22 and Schmidt. What we were expecting to be
23 tens of thousands of ballots became just
24 over 4,000.

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1 But still, these are 4,000
2 Philadelphia voters, 4,000 people who did
3 nothing wrong behind failing to put their
4 ballots into a second envelope. I cannot
5 with a good conscious count these.

6 I, therefore, vote no count.

7 COMMISSIONER SCHMIDT: I vote not
8 to count.

9 COMMISSIONER DEELEY: To count.
10 I'm sorry. I apologize. I read the wrong
11 thing. Let me correct myself.

12 I vote to count the 4,027 ballots
13 not enclosed in the Secrecy Envelope.

14 COMMISSIONER SCHMIDT: I vote not
15 to count.

16 COMMISSIONER SABIR: I vote not to
17 count.

18 MR. DIETZ: Okay.

19 That is all the categories I have
20 today.

21 COMMISSIONER DEELEY: This
22 business having con -- I'm sorry.

23 Does anybody have any New Business?

24 COMMISSIONER SCHMIDT: I have none.

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1 COMMISSIONER SABIR: I'd just like
2 to thank the Election Board Staff, the
3 Commissioners, the Deputies for the timely
4 hard work that leads to this election.

5 COMMISSIONER DEELEY: Thank you,
6 Commissioner Sabir.

7 The business having concluded, we
8 will stand in recess to the call of the
9 Chair.

10 (At this time, the Meeting
11 concluded at 9:12 a.m.)
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Meeting of the Commissioners - Elections
November 9, 2020

C E R T I F I C A T I O N

I, hereby certify that the proceedings
and evidence noted are contained fully and
accurately in the stenographic notes taken by me
in the foregoing matter, and that this is a
correct transcript of the same.

ANGELA M. KING, RPR,
Court Reporter, Notary Public

(The foregoing certification
of this transcript does not
apply to any reproduction of
the same by any means, unless
under the direct control
and/or supervision of the
certifying reporter.)

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STREHLOW & ASSOCIATES, INC.
(215) 504-4622

Exhibit A

Case ID: 201100878
Control No.: 20110899

Exhibit 4

Find information regarding COVID-19.

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ALLEGHENY COUNTY



November 12 - 10:30 AM Dispatch: The Elections warehouse operations began again this morning at 9 AM. The review of provisional ballots, with challenges by authorized representatives, continues.

Staff are also preparing provisional ballots for tabulation later today. These are the provisional ballots that were not challenged yesterday and will be partially counted based on the determination by Elections.

There are currently 18 representatives of candidates or parties observing or participating in the process. Of those, half are Democratic representatives and half are Republican representatives. Additionally, there is a staff person from the Committee on House Administration observing.

November 11 - 9 PM Dispatch: The operations at the Elections warehouse are done for today. The group will reconvene tomorrow at 9 AM.

All provisional ballots that were unchallenged and could be counted in their entirety were opened, scanned and tabulated this evening. That number of 8,097 bringing the total votes cast in Allegheny County to 717,733. A total of 14,969 votes were added to the totals today.

Of the 8,097 votes counted in the last batch, 4,345 were cast for Biden and 3,579 were cast for Trump. The full results are available on the Election results website.

Tomorrow, the last batches of the provisional ballots will be reviewed. The provisional ballots without challenge that can be partially counted will be created and scanned. The remaining overseas/military ballots will be created and scanned. Any provisional ballots in the last batches will also be scanned.

November 11 - 6:30 PM Dispatch After a brief 30 minute break for dinner, the review of provisional ballots and challenges has continued but will be wrapping up shortly for the evening. The vast majority of the provisional ballots have been reviewed at this point. Any remaining items will be transported to the warehouse tomorrow morning for review.

The final ballots out of the incorrect ballots were finished and scanned. The results have been uploaded to the website. This batch includes an additional 2,422 ballots with 1,803 votes cast for Biden and 569 votes cast for Trump. The total votes case by county voters is now 709,636. Today, a total of 6,872 votes were added to the count thus far.

The staff has also begun to process the provisional ballots for which there was no challenge and would be fully counted. We expect to have one more upload of results before work ends for the evening.

Tomorrow, the staff expects to finish the process to review provisional ballots and will begin processing and working through the provisional ballots for which there was no challenge and would be partially counted.

November 11 - 4:30 PM Dispatch: The review of provisional ballots continues. Those which have been designated as allowable votes that are not contested are being processed and are expected to be scanned/counted/tabulated later this evening.

Another batch of ballots from the 7,000 incorrect ballots that were returned by voters were scanned and added to the results page

The total count of votes added from that batch are 2,061 bringing the total ballots cast in the county to 707,214. Of those votes, 1,519 were cast for Biden and 460 were cast for Trump. This morning's first batch also included the 256 miscellaneous ballots that had been set aside for resolution and were determined to be valid to vote.

With both batches together, approximately 2,000 of the ballots from the 7,000 incorrect ballots remain to be scanned/counted/tabulated

November 11 - 1:15 PM Dispatch: The staff and authorized representatives have just re-convened after a short, 30-minute break for lunch.

The batch of 7,000 incorrect ballots that were returned are continuing to through the process to vote the candidates who would have appeared on the corrected ballot if that race also appeared on the incorrect ballot. Once that's complete, those ballots will be scanned, tabulated and reported. The first set of those ballots have been scanned and added to the results page.

The examination of provisional ballots has also begun this morning with representatives from both sides seated at the table for any challenges.

Warehouse staff are opening the ballot return bags to ensure there are no provisional ballots stored there and then will be resealing them. They are also extracting the poll books for scanning.

There were a total of 2,389 ballots that were uploaded into the system, bringing the total number of votes cast to 705,153. Of those ballots, 1,771 votes were cast for Biden and 578 votes were cast for Trump.

November 11 - 10 AM Dispatch: The operations at the Elections warehouse began again at 9 AM this morning.

The batch of 7,000 incorrect ballots that were returned are currently going through the process to vote the candidates who would have appeared on the corrected ballot if that race also appeared on the incorrect ballot. Once that's complete, those ballots will be scanned, tabulated and reported.

The examination of provisional ballots has also begun this morning with representatives from both sides seated at the table for any challenges.

Warehouse staff are also opening the ballot return bags to ensure there are no provisional ballots stored there and then will be resealing them. They are also extracting the poll books for scanning.

Currently, there are 21 authorized representatives for candidates or parties on site. Of those, 14 are representing Republican candidates and seven (7) are representing Democratic candidates. There is also a staff person here representing the Committee on House Administration.

November 10 - 9:15 PM Dispatch: Operations at the warehouse concluded at 9:15 PM for the evening. At a minimum, operations tomorrow will run from 9 AM to 9 PM, with a possibility that they could go longer into the evening.

The approximately 7,000 incorrect ballots are currently in process. As noted earlier, the staff did the sufficiency review, opened the declaration envelopes, and extracted the secrecy envelopes tonight. The rest of the process will be done tomorrow.

Tomorrow morning, the Return Board will begin to examine the provisional ballots and open the ballot return bags to ensure there are no provisional ballots stored there.

November 10 - 8 PM Dispatch The organization of and research into the provisional ballots for the Return Board process continues. The work is complete for approximately 560 precincts with the remaining in process.

All of the surrendered ballots have been reviewed to pull and set aside any of the batch of corrected ballots (with an orange bar) that were surrendered. There were a total of 1,331 ballots in that category and, of those, 120 ballots had a matching white (incorrect) envelope that had been returned to Elections. Those ballots have now been set aside. Another eight (8) ballots show that a white one (incorrect ballot) was returned in the SURE system but the white ballot has not yet been identified. Those ballots have also been set aside. The 128 number will be subtracted from the estimated 7,100 ballots to leave approximately 7,000 to be canvassed. The team is doing the sufficiency review, opening the declaration envelopes, and extracting the secrecy envelopes tonight. The rest of the process will be done tomorrow.

At today's Board of Elections meeting, the Board voted by a 2-1 vote to count the 2,349 ballots returned with no date. There is a 48 hour period to appeal that vote and so those ballots will be put aside until that time period has expired with no appeal, or until appeals have been exhausted, whichever comes first. Additionally, the 947 ballots that were postmarked on or before Election Day and received on November 4-6 remain segregated and have not been counted.

Approximately 200-300 that had miscellaneous issues to be resolved have been addressed and will move forward for canvassing. As of 3 PM today, another 317 military and overseas ballots had been received which will also be brought over for canvassing. With the above ballots, that brings the total estimated mail-in and absentee ballots to a little over 10,000 that remain to be canvassed with the noted caveats.

Another approximately 2,000 ballots were naked meaning they were returned without a secrecy envelope and will not be counted pursuant to the PA Supreme Court ruling. An additional 370 had incomplete voter declarations and will not be counted.

The plan for tomorrow is to begin examination of the provisional ballots and open the ballot return bags to ensure there are no provisional ballots stored there. Both will be done with the authorized representatives and watchers present.

November 10 - 12:50 PM Dispatch The review of surrendered and spoiled ballots continues at this time

Staff and authorized representatives are currently taking a half hour break for lunch and will reconvene at 1 PM.

The cover sheets for the provisional ballots for which research has been completed will be provided to authorized representatives once work begins again at 1 PM

The Elections Division also noted that it has received 4 OmniBallots which allow those who are visually impaired to vote by mail-in or absentee ballot. There were 7 applications and these 4 were returned timely. The votes from those ballots will be added to the tallies later today.

November 10 - 9 AM Dispatch: The staff convened again this morning at 9 AM. The review of surrendered and spoiled ballots has continued with five (5) of seven (7) regions complete and work underway on the sixth.

The examination of provisionals could begin today and we will note when that process occurs.

As of now, there are 18 representatives of campaigns or candidates at the warehouse – 11 represent the Republican party or candidates and seven (7) represent the Democratic party of candidates. Additionally, there are two staff members representing the Committee on House Administration present.

November 9 - 8 PM Dispatch Operations at the warehouse are concluding at 8 PM for the evening The review of surrendered and spoiled ballots continues and will be the first activity tomorrow as well

The examination of provisional ballots could begin tomorrow, to the extent that a precinct is not impacted by the review of a surrendered or spoiled ballot.

At a minimum, operations tomorrow will run from 9 AM to 9 PM, with a possibility that they could go longer into the evening.

November 9 - 4:30 PM Dispatch The Elections staff continues to go through the ballots that were surrendered or spoiled to find any ballots with an orange bar on them which would indicate that the county may have received an incorrect ballot as well. This process is necessary to ensure that no person votes more than once.

Of the appx. 6,500 ballots that had various issues to be resolved, the staff sorted through all of those today with approximately 500 being researched further. The Board of Elections will meet virtually tomorrow at 3 PM to consider resolution of those ballots.

This afternoon, 449 in person votes were added to the totals from the scanners that were returned to the warehouse and still had medium in them that had not been uploaded. This brought the number of total votes cast to 702,764. An additional 124 votes were cast for Biden and 320 for Trump. The full summary results is available on the election results webpage.

The division continues to work on the time-consuming process to research the approximately 17,000 provisional ballots. The sort of the surrendered and spoiled ballots must occur before examination of the provisionals begins. The staff has completed one of seven regions and is working on two others.

The mail in ballots that were postmarked on or before election day but received Wednesday through Friday remain segregated and have not been opened or counted.

The team plans to continue working this evening with no set end time. Additionally, hours are 9 AM to 9 PM tomorrow and for the remainder of the week, at a minimum.

November 9 - 10:30 AM Dispatch: This morning, there are three main activities occurring at the Elections warehouses: The bins of ballots still needing resolution are being reviewed by the Division Manager and Deputy Division Manager on a table in front of the observers. They will be sorted into two piles – one for ballots for which resolution is not possible; and, one for ballots that will require further research. Once they are sorted, the ballots that will require further research will be reviewed using the SURE system to determine if resolution is possible.

Elections officials are currently going through the envelopes of ballots surrendered at the polling places to pull any of the ballots returned by a voter who received an incorrect and corrected ballot. Those surrendered ballots will then be matched against the incorrect ballots that will be reviewed during the Return Board process. That step will ensure that anyone who voted in person will not also have their incorrect ballot voted.

Elections employees are also pulling the precinct-level scanners from a handful of precincts because the memory sticks remain in those scanners. In the vast majority of those cases, the votes are already contained in results as they were entered using the machine tapes.

There are currently 26 representatives of candidates and parties on premises. Of those, seven are Democratic, 17 are Republican and there are two representatives from Congress on hand to observe the activities.

November 7 - 2 PM Dispatch: The processing and counting of ballots was suspended while the Elections Division does some additional administrative work and research related to the final batch of ballots from the group of the correct/incorrect ballots. The Return Board and canvassing is expected to begin again on Monday, November 9 to allow time for the Division staff to do that work. There will be no further ballots counted, or results reported until that date.

November 7 - 11:35 AM Dispatch: The Elections Division has announced that another 7,253 votes have been added to the Allegheny County vote total, bringing the number of votes cast to 702,315. Of those, 5,184 votes were cast for Biden and 1,893 votes were cast for Trump. The full detail/summary report is available on the Elections results page at <https://results.enr.clarityelections.com/PA/Allegheny/106267/web.264614/>.

November 7 - 9 AM Dispatch: The Return Board resumed this morning at 9 AM. They are continuing to process the batch of ballots sent to voters that had to be reissued. Last night, the ballots from voters who returned both an incorrect and correct ballot were reviewed, processed, scanned and reported out. This morning, the ballots from voters who returned just the correct ballot are being reviewed and processed. They have begun the scanning process and a report on the results of those ballots are expected to be available sometime between 11 and Noon.

November 6 - 10:40 PM Dispatch The last update for today has been uploaded to the Election results webpage. There are 3,212 additional votes that have been added to bring the total vote count to 695,062. Of the most recent update, 2,436 votes went to Biden and 733 votes went to Trump. Additional detail is available on the results webpage.

For members of the media, access to the warehouse is available beginning at 8:30 AM. If your outlet was on the list today, you will be on tomorrow's list as well.

November 6 - 9:30 PM Dispatch: The Elections Division has just added the remaining military and overseas ballots returned to the Division thus far, as well as the ballots for voters who submitted correct and incorrect ballots. That number is 9,288 and brings the number of overall votes cast to 691,850. In the presidential race, 7,300 additional votes went to Biden and 1,875 votes went to Trump. The remaining detail on races in the county are available on the Elections' results webpage.

November 6 - 7:15 PM Dispatch The Return Board is continuing its work with military and overseas ballots and expects to close that process shortly. At that time, they will move to canvassing of the ballots of voters who received incorrect and corrected ballots.

The Division will first go through the ballots where a voter returned both a correct and incorrect ballot. If the correct ballot is sufficient, it will move forward for processing. If not, it and the incorrect ballot will be forwarded to the Return Board for processing. If only a correct ballot was returned, it will move forward for processing. If only an incorrect ballot was returned, it will be forwarded to the Return Board for processing.

Today's mail included 113 ballots of which 64 met the Court's criteria for counting. In the three days, 1,045 total ballots were received. Of those, 947 are able to be counted.

Finally, the Division has released results for the ballots that would not scan previously, and for 2/3 of the overseas and military ballots done to date. A total of 5,345 votes were added. In the Presidential race, 4,134 of those went to Biden and 1,076 went to Trump. The full summary result and totals are being uploaded to the election results website now.

November 6 - Noon Dispatch The Return Board has made the decision to not break for lunch and will instead work through until 4 30 PM

The total votes cast in the county are 677,172 and reflects the six precincts that were not reported until yesterday. They are in-person votes.

Yesterday's mail included 370 total pieces. Of those, 358 meet the criteria set forth by the Court.

To date, the county has received 3,873 overseas and military ballots. Those will continue to come into the office as the deadline is one week from Election Day, or next Tuesday.

Additionally, while there is not an exact number at this time, the Elections Division estimates that there are 17,000 provisional ballots and expect that number will grow

November 6 - 9 AM Dispatch: Two members of the Board of Elections – County Executive Rich Fitzgerald and Council Member Sam DeMarco – arrived at the Election warehouse this morning and made remarks, thanking the approximately 80 members of the Return Board who were being sworn in. County Executive Fitzgerald, who is the Chair of the Board of Elections, administered the oath of office.

The first item that the board is doing is addressing the 2,200 ballots that would not scan on Election night. These ballots are eligible to be counted and were reviewed, but would not go through the scanner. Authorized representatives of the parties and candidates on the ballot may have individuals here viewing the process and examining the ballots. Once that process is complete, the ballots can be scanned.

In yesterday's mail, 372 ballots were received. They are being reviewed now to see how many were postmarked on or before Election Day.

November 5 - 1 PM Dispatch: Allegheny County has counted all of the votes that are able to be voted to this point. Its remaining mail-in and absentee ballots fall into one of three categories:

1 The first category includes ballots that would not scan appropriately. The remedy is to address those ballots during the Return Board process. Again, by state law, the Return Board cannot convene until three days after the election.

2. Ballots returned that have been determined by the Elections Division to have sufficiency issues. These ballots will be reviewed as part of the Return Board process. This is an extra step to be as transparent as possible. By state law, the Return Board process cannot begin until three days after the election.

3. Ballots returned by voters impacted by the mailing error announced October 14 ([see release](#)) have a potential universe of 29,000. A process was outlined at that time. Subsequently, these ballots were brought up during the federal court case filed by Sean Parnell and Luke Negron related to watchers at additional offices. As a result of that, the county's process was provided and became part of the order issued by the Court. It specifically stated that Elections could not begin the review, processing and counting of ballots until after the ballot return deadline, which is Friday at 5 PM.

The convening of the Return Board has already been properly advertised and announced. The board is Elections Division staff and will be sworn in at 9 AM on Friday, November 6 at the Elections Warehouse at 901 Pennsylvania Avenue, Pittsburgh 15233.

November 4 - 11 PM Dispatch: The elections warehouse closed shortly before 11 PM this evening after final uploads of scanned mail-in and absentee ballots and additional in-person precinct results were added to the Election Results [webpage](#).

The current number of ballots cast is 675,928. This includes 313,072 mail-in and absentee ballots.

On Tuesday at 8 PM, we had a total of 348,485 mail-in or absentee ballots returned. The difference between the two numbers – mail-in/absentee votes counted (313,072) and total ballots returned (348,485) is 35,413. That 35,413 includes the universe of voters who received incorrect ballots and were then issued corrected ballots (appx. 29,000), ballots that were unscannable and will need to be duplicated during the Return Board process (appx. 2,250) and miscellaneous ballots like ones missing the date, or an

illegible voter on declaration (appx 4,350) Again, those numbers are all estimates and explain the differences between the number that we have now and the number of ballots returned

The Return Board will convene on Friday morning, November 6, at 9 AM. Although originally planned for the County Office Building, the Return Board will now convene at the Elections Warehouse. Further information and detail will be issued publicly tomorrow.

There are six precincts of the 1,323 that will be reported tomorrow as their results were not transmitted from the regional reporting centers on Tuesday. Those are Braddock Hills 02, Homestead 01-01, Pittsburgh 20-13, Pittsburgh 25-01, Shaler 02-05, and Whitehall 09.

Last, but not least, there is not any canvassing work being done at the warehouse tomorrow and it will be closed to media and observers. The Elections Division staff will be using the day to do administrative work. They will not be available for any media inquiries or interviews tomorrow.

November 4 - 8 PM Dispatch A small precinct update (in person voting) was added to the total counts, as well as 20,404 absentee and mail in ballots bringing the total number of votes cast to 658,040

The staff has scanned 287,171 mail-in and absentee ballots thus far with 114,103 of those scanned today since 10:30 AM.

November 4 - 6:45 PM Dispatch: A total of 3,366 additional in-person votes have been added to the total number of ballots cast in the county. These additions reflect precincts that did not report yesterday and include Bethel Park 2, Moon 7, North Fayette 2, Pittsburgh 3-4, Pittsburgh 5-12, Pittsburgh 9-1, Pittsburgh 20-2, Pittsburgh 21-1, Pittsburgh 32-4, Ross 4-2, and Upper St. Clair 8-2. This brings the number of ballots cast in the county to 636,468.

The next update will reflect additional scanned mail-in and absentee ballots.

November 4 - 6 PM Dispatch We have scanned an additional 29,008 ballots since the last update which brings today's total to 93,699 and the number of ballots cast in the county to 633,468

The staff has also reviewed the mail received today. There were 525 returned ballots that were postmarked on or before Election Day that were received today. This includes regular and overnight mail. An additional 25 ballots were received from FedEx and 12 ballots were postmarked after Election Day.

November 4 - 5 PM Dispatch: The staff is continuing to scan ballots at the warehouse.

As reported in the 2:45 AM update this morning, we received 348,485 ballots back from voters. In that report, we advised that 173,068 ballots had been scanned and uploaded. As of now, we are at 237,759, an increase of 64,691.

We are currently pulling data from the scanners and expect to have another upload to the website in the next 30-45 minutes.

There are 110,726 ballots remaining. An approximate 29,000 ballots will be reviewed as part of the Return Board process which leaves approximately 81,726 ballots to be counted. Of those, not all will be scanned during this process as some have been set aside due to various issues that need to be resolved before they can be opened and processed. We do not have a count of those ballots, but will provide those when one is available.

November 4 - 1 PM Dispatch: County staff, authorized representatives and media reported at 10 AM this morning to begin scanning again. Ballots that had been stored overnight in a locked cage under surveillance were brought out at approximately 10:15 AM and scanning began anew around 10:30 AM. As of noon, 15,118 additional ballots have been scanned and those results uploaded to the county's results page. Scanning continues now.

The county announced in October that nearly 29,000 incorrect ballots were sent to voters and, as a result new, corrected ballots were issued to those voters. The effort to reconcile those ballots with the voters will be done as part of the Return Board process. Additionally, there are an unknown number (our priority has been to process, scan and

count the ballots with no issues) of ballots will need to be resolved with the Elections Division in consultation with the Law Department. The review of those ballots will begin later today and updates and numbers of those will be provided as they are available.

We do not currently have a count of provisional ballots cast in Allegheny County and will likely not have those numbers for several days.

Today's mail has arrived at the Elections warehouse. We estimate that approximately 500 mail-in and absentee ballots were delivered. As announced previously, those ballots will be segregated along with any mail received through Friday.

November 4 - 2:45 AM Dispatch: The county has made the decision to suspend scanning and will begin again after 10 AM. Staff are being asked to report at 10 AM and scanning will begin shortly after.

As noted earlier, we have 348,485 mail in and absentee ballots that have been returned. Of those, 173,068 are scanned and uploaded and approximately 29,000 will be reviewed manually through the Return Board process. The remaining 146,537 will be scanned beginning late morning tomorrow and updates provided as that process begins until complete.

All ballots have been secured in the warehouse with County Police patrolling the facility all evening. The facility is also under 24-hour video surveillance.

November 4 - 1 AM Dispatch: Late on Tuesday evening, our tech staff noticed that precinct information was not loading as quickly as it should have been. After doing some troubleshooting, and testing, with the tech staff, the decision was made to back out the votes coming in from the regional reporting systems and to transmit them again. For a short period of time, the total votes dropped by about 10,000 and has since continued to go back up with 515 precincts uploaded to the reporting software. The team is updating the system every 15 minutes.

A total of 151,022 mail and absentee ballots have been scanned as of now. The process is continuing with staff separating, extracting and flattening ballots. The expectation is that staff will complete that process within the next 60-90 minutes.

November 3 - 10:30 PM Dispatch: There have been 348,485 total mail in and absentee ballots recorded as returned. Of those, 125,383 are scanned.

Of the in person voting, 421 precincts are currently reporting with more coming in

November 3 - 9:15 PM Dispatch: There are currently 111,884 mail-in and absentee ballots scanned. The number of ballots marked returned is 347,711, and will continue to go up.

The results webpage is updating about every half hour and now includes both mail-in/absentee ballots and in-person results. You can find a link directly to the results page at <https://alleghenyvotes.com>.

Please note that we are aware that a number of national outlets are reporting incorrect vote totals and over reporting the number of votes for Donald Trump, apparently because of a typo. This is not an error on the county's side. We are trying to reach the source company to ask for them to correct the data.

November 3 - 8 PM Dispatch: Polls are closed.

There are 95,998 ballots scanned currently. The first set of 65,000 has been tabulated and uploaded to the Elections Results page (visit for a direct link - <https://alleghenyvotes.com>). The remaining will be uploaded immediately afterward.

As of 8 PM today, there were 413,716 applications for mail-in and absentee ballots approved. This includes the emergency ballots that were applied for over the past week.

There have been 347,670 recorded as received as of 8 PM. That number will continue to increase as the other ballots received today will be added to that total.

November 3 - 7 PM Dispatch As of 6 40 PM, we have scanned 82,716 ballots

There are approximately 20,000 ballots that did not contain bar codes and are being manually entered and checked in. We expect that in the next hour or two, the vast majority of the ballots will have had the secrecy envelopes separated from the declaration envelopes with only the final set of ballots needing to go through the

process. There will also be additional ballots that were returned by voters to the County Office Building that will be transported here after polls close and will also go through the process for opening.

There are currently 160+ staff working on that process. A third shift of employees will come in relieve this set at 11 PM.

November 3 - 5 PM Dispatch: At polling places - The poll worker removed earlier from Pittsburgh 04-10 and 04-11 has been allowed to return by the Court.

We have received reports of a few polling places which did not have voters sign the poll book. Those voters do not need to come back. The numbered list of voters will be used to remedy this issue and note those voters as having cast a vote in this election.

Two poll workers at Pittsburgh 15-1, 15-2, 15-3 location removed for fighting; unclear if verbal or physical. Both left before deputies arrived and the other left willingly.

A Court Order was issued for two poll watchers to be removed from Penn Hills 02-03 and 02-04 for alleged voter intimidation. The watchers voluntarily left, but vehemently denied any wrongdoing.

At the warehouse - At 5 PM, five full trays of returned ballots were delivered to the warehouse from the County Office Building. That accounts for approximately 2,000 ballots. Ballots may still be returned until 8 PM.

As of 4:45 PM, 59,799 ballots have been counted.

November 3 - 3 PM Dispatch: In the 8 AM dispatch, we noted that Pittsburgh 05-05 was unable to open on time. The Judge of Elections' vehicle was stolen with the suitcase inside and has since been recovered. The suitcase does NOT contain ballots. It contains the poll book and keys needed to open the ballot marking device and scanner, as well as other paperwork/materials. The Sheriff's Office also recovered the suitcase and has it in their custody. Four of the five individuals believed to be in the vehicle are in custody, all are juveniles.

This afternoon, the Court ordered the removal of a poll worker from the polling place for Pittsburgh 4-10 and 4-11 on Ellsworth Avenue. Other poll workers reported that the individual was causing a disturbance, taking pictures and video of polling place.

activities, and looking at voters' ballots prior to those being scanned

At the warehouse, we have 43,894 ballots scanned as of 3 PM today. The first shift is leaving and a second one of approximately 200 employees is coming in.

November 3 - 1 PM Dispatch: As of 1 PM, there are 25,583 ballots scanned. Staff are split approximately 50/50 now between removing the ballot from the privacy envelope and flattening the ballots for scanning. Another 30-40 people are continuing to process the mail that was received late yesterday and today so far.

There are no real updates for polling places. Some sites still have lines, but most appear to be moving smoothly at this time. There have been some complaints of individuals not wearing masks, requests to increase physical distancing and some arguments at polling places. Elections has issued reminders to poll workers and has been checking to ensure proper physical distancing in place. There has been no need to take any actions relative to arguments.

'November 3 - 11 AM Dispatch: As of 11 AM this morning, there have been over 9,000 ballots scanned. Yesterday and today's mail is being checked in and processed.

All ballots are in some step of the process with two exceptions: (1) The ballots returned by voter that received incorrect ballots. Those ballots will be processed manually to reconcile them per the process outlined previously; and, (2) Ballots that have been identified today as needing resolution will be reviewed by a team of elections officials in consultation with the Law Department about further steps.

The Elections Division continues to respond to any issues at polling places.

November 3 - 9:30 AM Dispatch: The first few thousand mail-in and absentee ballots will be scanned shortly. Approximately 80% of ballots at the warehouse are at some stage of the pre-canvassing process.

Over 105,000 have had the declaration review and had that first envelope opened, and another 10,000 have now had the secrecy envelope opened and are extracting and flattening the ballots for scanning.

The three polling places that were delayed in opening are all open and operating now. Reports of machines that are not working correctly have all been addressed, with the majority of them being operator error. Additional reports of needs for additional supplies or items for polling places have been addressed, or were provided but poll workers were not aware they already had them.

November 3 - 8:20 AM Dispatch: At this time, there are three election districts which have not opened. Elections has staff at each site and is creating a new suitcase with materials so that they can open. They are Monroeville 1-1, McKeesport 12-1 and Pittsburgh 5-5.

At the warehouse, approximately 25% of ballots are at some stage of processing. Over 13,500 have gone through the declaration review and have had the declaration envelope opened and the secrecy envelopes extracted.

November 3 - 7 AM Dispatch: Polls are now open and the pre-canvassing process is beginning shortly of mail-in and absentee ballots.

We have had a few reports, as we do each year, of polling places that will be opening a few minutes late as poll workers set up equipment, or because someone was late.

Exhibit 5



COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

DONALD J TRUMP FOR PRESIDENT INC

vs.

BUCKS COUNTY BOARD OF ELECTIONS

NO. 2020-05786

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Bucks County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: Britain Henry, Esq., ID: 314279

Self-Represented (Pro Se) Litigant ☐

Class Action Suit

☐

Yes

☒

No

MDJ Appeal

☐

Yes

☒

No

Money Damages Requested ☐**Commencement of Action:****Amount in Controversy:**

Petition

Case Type and Code

Miscellaneous: _____

Other _____

Other:

ELECTION

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

IN RE: CANVASS OF ABSENTEE
AND/OR MAIL-IN BALLOTS OF
NOVEMBER 3, 2020 GENERAL
ELECTION

STATUTORY APPEAL

No. _____

(Election Appeal)

ORDER OF COURT

AND NOW, to-wit, this _____ day of _____, 2020, upon consideration of Petitioners' Notice of Appeal via Petition for Review and finding that an error of law occurred, it is hereby ORDERED, ADJUDGED and DECREED that, following an informal adjudicator proceeding, the decision of the Bucks County Board of Elections in denying Petitioners' objections as to the statutorily prohibited absentee and/or mail-in ballots is reversed. The identified absentee and/or mail-in ballots were not completed / returned / filled out correctly by the electors in accordance with the Pennsylvania Election Code; thus, they are invalid, void and cannot be counted.

BY THE COURT:

_____. J.

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

IN RE: CANVASS OF ABSENTEE AND
MAIL-IN BALLOTS OF NOVEMBER 3,
2020 GENERAL ELECTION

STATUTORY APPEAL

No. _____

(Election Appeal)

**NOTICE OF APPEAL VIA PETITION
FOR REVIEW OF DECISION BY THE
BUCKS COUNTY BOARD OF
ELECTIONS**

Code: 190

FILED ON BEHALF OF PETITIONERS,

Donald J. Trump for President Inc.,
c/o Porter Wright Morris & Arthur LLP
Six PPG Place, Third Floor
Pittsburgh, PA 15222

Heidelbaugh for Attorney General, Inc.,
c/o Porter Wright Morris & Arthur LLP
Six PPG Place, Third Floor
Pittsburgh, PA 15222

Garrity for PA
c/o Porter Wright Morris & Arthur LLP
Six PPG Place, Third Floor
Pittsburgh, PA 15222

Counsel of Record for Petitioners:
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- and -

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Britain Henry (PA #31427)
Goldstein Law Partners, LLC
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(610) 949-0444 (Telephone)
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IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA

IN RE: CANVASS OF ABSENTEE AND
MAIL-IN BALLOTS OF NOVEMBER 3,
2020 GENERAL ELECTIONSTATUTORY APPEAL
No. _____

(Election Appeal)

**NOTICE OF APPEAL VIA PETITION FOR REVIEW OF DECISION BY
THE BUCKS COUNTY BOARD OF ELECTIONS**

NOW COMES Donald J. Trump for President, Inc., Republican National Committee, Heidelbaugh for Attorney General, Inc., Garrity for PA, (the "Petitioners"), pursuant to Section 3146.8 and 3157(a) of the Pennsylvania Election Code, 25 P.S. §§ 3146.8 & 3157(a), by their undersigned counsel, hereby file this notice of appeal via a petition for this Court to review and reverse the decision of the Bucks County Board of Elections in denying Petitioners' objection to the counting of statutorily prohibited absentee and/or mail-in ballots cast in Bucks County, PA, in the November 3, 2020 General Election. In support thereof, Petitioners state as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this statutory appeal and venue is proper in this Court pursuant to Section 3157 of the Election Code, 25 P.S. § 3157(a).

PARTIES

2. Petitioner Donald J. Trump for President, Inc. (hereinafter, the "Trump Campaign"), is the principal committee for the reelection campaign of Donald J. Trump, the 45th President of the United States of America (hereinafter, "President Trump"). President Trump is the Republican candidate for the office of the President of the United States of America in the ongoing November 3, 2020 General Election. The Trump Campaign brings this action for itself

and on behalf of its candidate, President Trump. President Trump is a “candidate” as that term is defined in Election Code Section 102(a), 25 P.S. § 2602(a). *See Rowland v. Smith*, 83 Pa. D. & C. 99, 101-2 (Pa. Ct. Com. Pl. Dauphin 1952) (“candidate” under the Election Code includes one who is a candidate for nomination for President of the United States). The Trump Campaign is a “political body” as that term is defined in 25 P.S. § 1102. *See In re Canvass of Absentee Ballots of November 4, 2003*, 839 A.2d 451, 457 (Pa. Commw. Ct. 2003) (Under Election Code, status given to political bodies grants standing regarding watchers), *rev’d on other grounds* 843 A.2d 1223 (Pa. 2004); *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987) (a candidate for office in the election at issue suffers a direct and substantial harm sufficient for standing to contest the manner in which an election will be conducted).

3. Petitioner, Republican National Committee (hereinafter, the “RNC”) is a national political committee that leads the Republican Party of the United States (hereinafter, the “Republican Party”). RNC works to elect Republican candidates to state and federal offices throughout the United States, including in the Commonwealth of Pennsylvania, and it organizes and operates the Republican National Convention through which its members nominate their candidates for President and Vice President of the United States. The Republican Party includes over thirty million (30,000,000) registered Republicans in all fifty (50) states, the District of Columbia, and the U.S. territories, and constitutes a “political party” as that term is defined in Election Code Section 801, 35 P.S. § 2831. The RNC brings this action for itself, the Republican Party, all of its members, all registered Republican voters, and all nominated Republican candidates in the November 3, 2020, General Election in the Commonwealth of Pennsylvania. As a political committee, the RNC has Article III standing to bring this action. *See e.g., Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573-75 (6th Cir. 2004); *Pa.*

Democratic Party v. Republican Party of Pa., 2016 U.S. Dist. LEXIS 153944, at *8-9 (E.D. Pa. Nov. 7, 2016); *Democratic Exec. Comm. v. Detzner*, 347 F. Supp. 3d 1017, 1025 (N.D. Fl. 2018); *Orloski*, 564 F. Supp. at 530-31.

4. Petitioner Heidelbaugh for Attorney General, Inc. is the principal committee for the election campaign of Heather Heidelbaugh for the office of Attorney General of Pennsylvania (“Heidelbaugh”). Heidelbaugh is the Republican candidate for the office of Attorney General of Pennsylvania in the ongoing November 3, 2020 General Election. Heidelbaugh for Attorney General, Inc. brings this action for itself and on behalf of its candidate. Heidelbaugh is a “candidate” as that term is defined in Election Code Section 102(a), 25 P.S. § 2602(a). Heidelbaugh for Attorney General, Inc. is a “political body” as that term is defined in 25 P.S. § 1102. *See In re Canvass of Absentee Ballots of November 4, 2003*, 839 A.2d 451, 457 (Pa. Commw. Ct. 2003) (Under Election Code, status given to political bodies grants standing regarding watchers), *rev’d on other grounds* 843 A.2d 1223 (Pa. 2004); *In re General Election – 1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987) (a candidate for office in the election at issue suffers a direct and substantial harm sufficient for standing to contest the manner in which an election will be concluded).

5. Petitioner Garrity for PA is the principal committee for the election campaign of Stacy L. Garrity for the office of Treasurer of Pennsylvania (“Garrity”). Garrity is the Republican candidate for the office of the Treasurer of Pennsylvania in the ongoing November 3, 2020 General Election. Garrity for PA brings this action for itself and on behalf of its candidate, Garrity. Garrity is a “candidate” as that term is defined in Election Code Section 102(a), 25 P.S. § 2602(a). Garrity for PA, Inc. is a “political body” as that term is defined in 25 P.S. § 1102. *See In re Canvass of Absentee Ballots of November 4, 2003*, 839 A.2d 451, 457 (Pa. Commw. Ct.

2003) (Under Election Code, status given to political bodies grants standing regarding watchers), *rev'd on other grounds* 843 A.2d 1223 (Pa. 2004); *In re General Election – 1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987) (a candidate for office in the election at issue suffers a direct and substantial harm sufficient for standing to contest the manner in which an election will be concluded)

6. Respondent Bucks County Board of Elections (“Board”) is responsible for overseeing the conduct of elections in Bucks County, including but not limited to the administration of the pre-canvass and canvass sessions of the Board during which absentee and mail-in ballots are opened, reviewed and counted, which is required to be done in accordance with the Election Code. Its principal place of business is located at 55 East Court Street, Doylestown, PA 18901.

FACTS AND PROCEDURAL BACKGROUND

7. Codified Sections 3146.1 – 3146.9 of the Pennsylvania Election Code provides for the voting by electors through official absentee ballots in any primary or election held in the Commonwealth of Pennsylvania. *See* 25 P.S. §§ 3145.1-3146.9.

8. Section 3145.6 specifically addresses how an absentee elector shall complete their absentee ballot, while section 3146.6a details the assistance permitted in voting by certain absentee electors. *See* 25 P.S. §§ 3145.6 and 3146.6a.

9. In Pennsylvania, absentee voting has been held to be “an extraordinary procedure” in which the “ordinary safeguards of a confrontation of the voter by the election officials and watchers for the respective parties and candidates at the polling place are absent.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa.D.&C.2d 419, 420 (C.C.P. Phila. 1964). Although it is “a salutary feature in our democratic processes of

government,” *Absentee Ballots Case (No. 1)*, 245 A.2d 258, 261 (Pa. 1968); absentee voting is a privilege that is “fraught with evils and frequently results in voided votes.” *Decision of County Board of Election*, 29 Pa.D.&C.2d 499, 504 (C.C.P. Lebanon 1964). Thus, it has been recognized by the Pennsylvania courts that “the provisions of the law regarding absentee voting must be strictly construed and the rights created thereunder not extended beyond the plain and obvious intention of the act.” *Decision of County Board of Election*, 29 Pa.D.&C.2d at 504; *see also In re: April 10, 1984 Election of E. Whiteland Twp., Chester Co.*, 483 A.2d 1033, 1035 (Pa. Commw. Ct. 1984); *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa.D.&C.2d at 421.

10. On October 31, 2019, the Pennsylvania General Assembly enacted Act 77. *See* Act 2019-77 (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019. Act 77 made significant changes to Pennsylvania’s elections, including the adoption of no excuse mail-in voting for all qualified electors. *See, e.g.*, 25 P.S. §§ 3150.11-3150.17.

11. In extending the right to vote to include absentee voting and now no-excuse mail-in voting, the Pennsylvania General Assembly has properly provided in the Pennsylvania Election Code various safeguards to insure that the exercise of the absentee and mail-in voting privilege is not abused either directly or indirectly, inadvertently or maliciously. *See* 25 P.S. §§ 3146.1-9 (voting by qualified absentee electors) and 3150.11-3150.18 (voting by qualified mail-in electors).

12. The public has a strong interest in ensuring that the election is conducted in a free and fair manner and that all duly qualified and properly registered voters have equal and adequate opportunity to vote, whether they vote in person, by absentee or mail-in ballot.

13. On November 3, 2020, a general election was held in which Petitioners were

candidates and/or registered voters (as is the case for Heidelbaugh and Garrity who did in fact cast their votes).

14. The November 3, 2020 general election was the first general election following the enactment of Act 77 in 2019, which made significant changes to Pennsylvania's elections, including the adoption of no excuse mail-in voting for all qualified electors. *See, e.g.*, 25 P.S. §§ 3150.11-3150.17. Presumably knowing of all the risks associated with mail-in voting, the General Assembly enacted no excuse mail-in voting with certain restrictions designed to ensure the ballot's secrecy and to prevent fraud. One of those restrictions, for example, forbidding third-party delivery, was replicated in Act 77 and was confirmed by the Pennsylvania Supreme Court as recently as September 17, 2020. *See* 25 P.S. § 3150.16(a); *Crossey v. Boockvar*, No. 108 MM 2020, 2020 Pa. LEXIS 4868, at *4 (Pa., Sept. 17, 2020) ("It has long been the law of this Commonwealth, per 25 P.S. § 3146.6(a), that third-person delivery of absentee ballots is not permitted. Act 77 adds a substantially identical provision for mail-in ballots, which we likewise conclude forbids third-party delivery of mail-in votes.") (citations omitted).

15. In *Pa. Democratic Party v. Boockvar*, 2020 WL 5554644, 2020 Pa. LEXIS 4872 (Pa., Sept. 17, 2020), the PA Supreme Court declared that absentee and mail-in ballots cast in violation of Election Code's mandatory requirements are void and cannot be counted. *Id.*, 2020 Pa. LEXIS 4872, at *66-*74.

16. At issue in this appeal is Sections 3146.6 and 3150.16(a) of the Election Code, which states in pertinent part:

Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, the elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in

the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a).

17. Act 77 duplicated this section for mail-in ballots, as codified at 25 P.S. § 3150.16(a):

At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

5 P.S. § 3150.16(a)

18. The requirements set forth in Election Code Sections 3146.6(a) and 3150.16(a) are mandatory. *See* 25 P.S. §§ 3146.6(a) & 3150.16(a). Those sections mandate that the elector fold the ballot, enclose it, and secure it in the smaller envelope on which is printed "Official Election Ballot," and then place the inner secrecy envelope into the second envelope on which is printed the form of declaration of the elector, the elector's local election district, and the address of the elector's county board of election. Accordingly, the PA Supreme Court ruled that a mail-in or absentee ballot that is not enclosed in the statutorily-mandated inner secrecy envelope must

be disqualified and not counted. 2020 Pa . LEXIS 4872, at *73.]

19. The law is clear that during the counting at any pre-canvass and/or canvass meeting of absentee and mail-in ballots, those ballots which suffer from the following deficiencies are void and may not be counted: (i) without inner secrecy envelopes, (ii) with inner secrecy envelopes that have marks, text, or symbols which identify the elector, the elector's political affiliation or the elector's candidate preference, and/or (iii) with the declaration envelopes not filled out, dated, and/or signed. 25 P.S. §§ 3146.6(a) & 3150.16(a).

20. Under 25 P.S. § 3146.8, ballots received after 8:00 p.m., on the Tuesday November 3, 2020, were set aside and separated into five (5) categories as follows: (1) Postmarked November 3rd or earlier; (2) Illegible Postmark; (3) No Postmark; (4) Postmarked after November 3rd; and (5) Miscellaneous / Not Sure. Of the 629 ballots to be further reviewed, Petitioners challenge the ballots accepted by the Board of Elections . *See* 25 P.S. § 3146.8(g)(4).

21. Under 25 P.S. § 3146.8, ballots received prior to 8:00 p.m., on the Tuesday November 3, 2020, were set aside for defects. These ballots totaled 2,296 and were separated into the following categories: (1) No signatures – 111; (2) No Date / Partial Date - 1,197; (3) No Printed Name Or Address – 644; (4) Partial Addresses – 87; (5) Mismatched Addresses – 247; (6) Mismatched Names -13; and (7) Miscellaneous - 4.

22. The Board of Elections took the following actions:

- a. Declined to accept as votes 111 ballots with no signatures;
- b. Accepted as votes 1,197 ballots with no date or a partial date;
- c. Accepted as votes 644 ballots with no printed name or address;
- d. Accepted as votes 87 ballots with a partial address;
- e. Accepted as votes 247 ballots with a mismatched address;

- f. Declined to accept as votes 13 ballots with mismatched names; and
- g. Declined to accept as votes 4 ballots for miscellaneous reasons.

23. The Board of Elections, accordingly, accepted a total of 2,175 of the 2,296 defective ballots as votes.

24. Petitioners challenge the 2,175 defective ballots accepted as of votes by the Board of Elections. *See* 25 P.S. § 3146.8(g)(4).

25. Under 25 P.S. § 3146.8, , the Board of Elections set aside 805 ballots received prior to 8:00 p.m., on the Tuesday November 3, 2020.

26. These 805 ballots were separated into the following categories: (1) Naked Ballots – 708; (2) Unsealed Privacy Envelopes – 69; and (3) Markings – 28.

27. The Board of Elections took the following actions in regard to these 805 ballots:

- a. Declined to accept as votes 708 naked ballots;
- b. Accepted as votes 69 ballots with unsealed privacy envelopes;
- c. Declines to accept as votes 21 of the ballots with markings, and accepts as votes 7 of the ballots with markings.

28. The Board of Elections, accordingly, accepted a total of 76 of the 805 ballots as votes.

29. Petitioners challenge these 76 ballots accepted as of votes by the Board of Elections. *See* 25 P.S. § 3146.8(g)(4)

30. Under 25 P.S. § 3146.8(d), “whenever it shall appear by due proof that any absentee elector or mail-in elector who has returned his ballot in accordance with the provisions of this act *has died prior to the opening of the polls on the day of the primary or election, the ballot of such deceased elector shall be rejected* by the canvassers but the counting of the ballot

of an absentee elector or a mail-in elector thus deceased shall not of itself invalidate any nomination or election. 25 P.S. § 3146.8(d)(emphasis added).

31. Under 25 P.S. § 3146.8(g)(3) and (h), the ballots of absentee and/or mail-in voters whose identification has not been verified by election officials are not to be counted during any pre-canvass and canvass meeting. 25 P.S. § 3146.8(g)(3) and (h).

32. Under 25 P.S. §§ 3146.6(a) and 3150.16(a), the ballots of absentee and/or mail-in voters that were not enclosed and/or securely sealed in an envelope with the “Official Election Ballot” either “printed, stamped or endorsed,” shall be set aside and not counted. *See* 25 P.S. § 3146.6(a) (“... the elector shall ... enclose and securely seal the [ballot] in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’”); 25 P.S. § 3150.16(a). *See also Pa. Democratic Party v. Boockvar*, 2020 Pa. LEXIS 4872, at *70-74, 2020 WL 5554644 (Pa. Sept. 17, 2020) (“shall” is mandatory).

33. In summary, the statutorily prohibited ballots fall into the following categories:

- a. For failure to seal the secrecy envelopes, pursuant to 25 P.S. §§ 3146.6(a) and 3150.16(a);
- b. For failure to include a date or including only a partial date;
- c. For failure to include a printed name and/or address;
- d. For including only a partial address;
- e. For including a mismatched address

34. On November 7, 2020, during an informal adjudicatory proceeding before the Board of Elections, Petitioners asserted objections to the counting of the aforementioned 805 and 76 statutorily prohibited absentee and/or mail-in ballots based on the deficiency identified herein and these ballots were placed at issue, were sequestered and set aside at the Bucks County Board

of Elections.

35. On November 7, 2020, the Bucks County Board of Elections held a hearing as to the subject statutorily prohibited absentee and/or mail-in ballots.

36. At the hearing before the Bucks County Board of Elections, 69 unsealed privacy envelopes were accepted, and 7 envelopes with markings were accepted.

37. At the conclusion of the informal adjudication on November 7, 2020, the Bucks County Board of Elections denied Petitioners' objections as to those identified statutorily prohibited ballots herein

38. It is believed and therefore averred that by mistake, error or other irregularity, the Bucks County Board of Elections has improperly construed the Pennsylvania Election Code to permit the counting of the cited absentee and/or mail in ballots at issue in this appeal, which are void as a matter of law and should be prohibited from being counted pursuant to 25 P.S. §§ 3146.6(a) and 3150.16(a).

39. Following an informal adjudication, the November 7, 2020 decision of the Board, which denied Petitioners' objections to the aforementioned statutorily prohibited absentee and/or mail-in ballots, constitutes an abuse of discretion and involve errors of law.

40. The Bucks County Board of Elections is not empowered to re-write the Election Code or adopt rules, regulations, instructions or decisions that are inconsistent with the Election Code. *See* 25 P.S. § 2642.

41. It is undisputed that the mail-in and /or absentee ballots identified in this Petition..

42. Accordingly, the decision of the Bucks County Board of Elections denying Petitioners' objections as to the absentee and/or mail-in ballots identified here is based on a clear error of law and must be reversed.

43. This Notice of Appeal via Petition for Review has been timely made.

WHEREFORE, Petitioners respectfully request this Honorable Court to enter an order that reverses the decision of the Bucks County Board of Elections and sustains Petitioners' objections as to those statutorily prohibited absentee and/or mail-in ballots cast by voters in the November 3, 2020 General Election, and for such other and further relief as provided by the Pennsylvania Election Code and/or as this Court deems just and appropriate.

Dated: November 9, 2020

Respectfully submitted,

/s/ Britain Henry

Jonathan S. Goldstein (PA # 201627)

Britain Henry (PA #314279)

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cmcgee@portwright.com

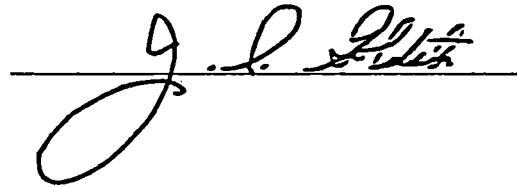
Counsel for Petitioners

VERIFICATION

I, Jonathan S. Goldstein hereby swear or affirm that I am counsel of record for Petitioners in the within action; that the verification of the Petitioners could not be obtained within the time allowed for filing this Petition; and that the facts contained in the attached Petition are true and correct based on information supplied to be by others.

This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: November 9, 2020

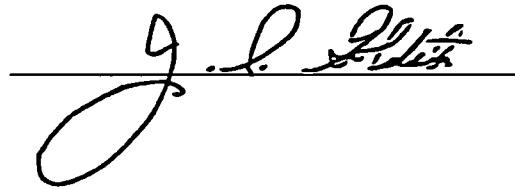
A handwritten signature in black ink, appearing to read "J. S. Goldstein", is written over a horizontal line.

VERIFICATION

I, Jonathan S. Goldstein hereby swear or affirm that I am counsel of record for Petitioners in the within action; that the verification of the Petitioners could not be obtained within the time allowed for filing this Petition; and that the facts contained in the attached Petition are true and correct based on information supplied to be by others.

This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: November 9, 2020

A handwritten signature in black ink, appearing to read "J. S. Goldstein", is written over a horizontal line.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Britain Henry .

VERIFICATION

I, Jonathan S. Goldstein hereby swear or affirm that I am counsel of record for Petitioners in the within action; that the verification of the Petitioners could not be obtained within the time allowed for filing this Petition; and that the facts contained in the attached Petition are true and correct based on information supplied to be by others.

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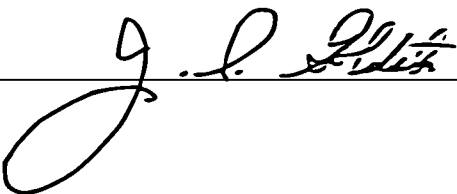
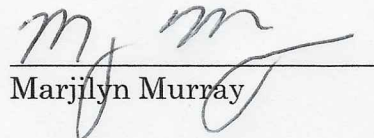


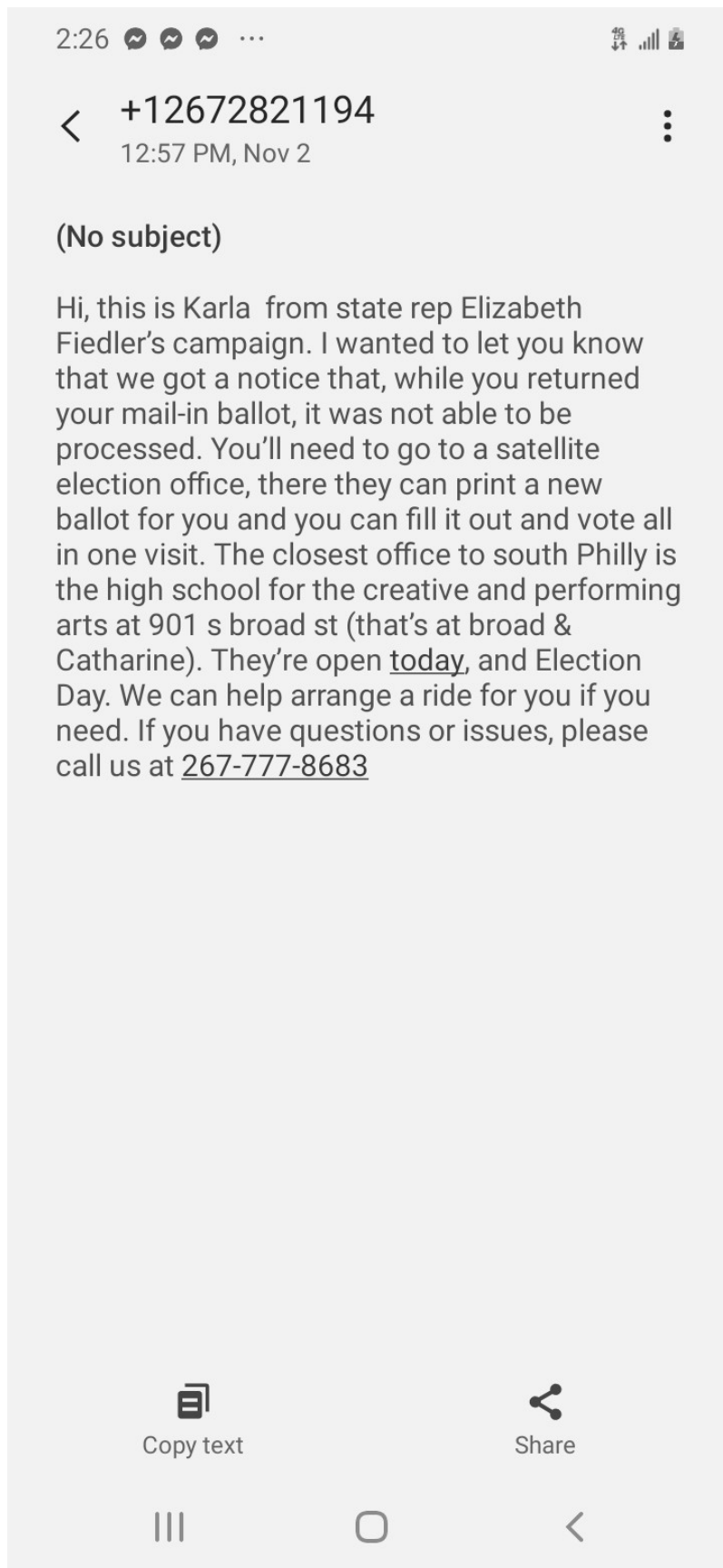
Exhibit 6

DECLARATION

1. My name is Marjilyn Murray. I am over the age of 18. All the facts stated herein are true and based on my personal knowledge.
2. I am a resident of Philadelphia County, Pennsylvania.
3. I voted using a mail-in ballot for the 2020 General Election.
4. After submitting my ballot, I received a text message on November 2, 2020 at about 12:57 p.m. from Elizabeth Fiedler's campaign for a state representative office. See Exhibit 1.
5. My understanding is that Elizabeth Fiedler is a democratic candidate
6. The text message stated that my ballot was unable to be processed and informed me that I had to go to a satellite office to get a new ballot printed for me to fill out and vote.
7. I asked if I could just vote provisionally, and they said that if I did that, there would be a chance my vote would not count. Exhibit 2.
8. I am friends with Al Schmidt. Via a Facebook Messenger chat that was deleted, he informed me that my ballot was rejected because it did not have an inner secrecy envelope.
9. I declare under penalty of perjury that the forgoing is true and correct. (28 U.S.C. § 1746).

Executed on November 12, 2020


Marjilyn Murray



2:26



< +12672821194



I wanted to let you know that we got a notice that, while you returned your mail-in ballot, it was not able to be processed. You'll need to go to a satellite election office, there they can print a new ballot for you and you can fill it

View all



MMS
12:57 PM

1:14 PM

Can i vote in person and just ask for a provisional ballot tomorrow at my polling place? Thank u for your help



Yes you can but there's a chance you'd vote would not be counted on time.

1:18 PM

1:18 PM

Aaahhh ok. So tomorrow go to capa instead of my polling place?



That would be ideal. They are open today till 4:30 and tomorrow 7am-8pm.

1:20 PM

1:24 PM

Wonderful thank u so much!



You're welcome. You can call or text me if you have any questions

1:24 PM



Exhibit 7

DECLARATION OF THOMAS HETAK

COMMONWEALTH OF PENNSYLVANIA)
) SS
COUNTY OF NORTHAMPTON)

DECLARATION OF THOMAS HETAK

I THOMAS HETAK declare as follows:

1. I am a resident of Northampton County, Pennsylvania. I am over 18 years of age and my date of birth is: March 25, 1965. I have personal knowledge of the contents of this Declaration and if called as a witness I could and would testify competently as to their truth.
2. I'm a registered Voter and qualified to vote in the Commonwealth of Pennsylvania.
3. I requested a mail in ballot for the 2020 US Presidential Election, and I submitted it by mail 2 weeks before November 3, 2020.
4. On October 26th, 2020 I received an email from RA-voterregstatcert@state.pa.us stating:
"Your ballot status has been updated to 'cancelled' because of voting at a polling place..."
This email will be attached to this Declaration.
5. I never voted at a polling place, and my ballot should have been cancelled for this reason.
6. On November 2, 2020 I received an email from a GOP account further reminding me,
"Records show you requested a mail in ballot but have not returned it. If you plan to vote in person..." This email will also be attached to this Declaration.
7. I was not able to vote in person because travel took me out of Pennsylvania in the weeks leading up to and during the election.

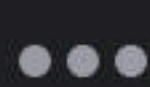
8. My votes were for Donald Trump for President and down ballot Republican candidates.
9. The current status of my mail in ballot according to the Secretary of State is “cancelled”.
10. I was told my ballot was cancelled because of a record that I voted in person. I did not vote in person. My cancelled, mail in ballot should be reinstated, as it was in fact the only vote I submitted in this election.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

EXECUTED ON: **November 10, 2020**

By: /s/THOMAS HETAK
Name: THOMAS HETAK

4:43



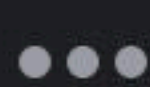
Your Ballot Has Been Received



Inbox



RA-voterregstatcert Oct 26
to HECIOT ▾



Dear THOMAS HETAK,

Your ballot has been received by
NORTHAMPTON County on 10/26/2020.

Your ballot status has been updated to
cancelled because it cannot be counted due
to **voting** at the polling place.

If you have questions about your ballot,
please contact NORTHAMPTON County at
(610) 829-6260.

Thank you

****Please do not reply to this email.****

← Reply

→ Forward

4:43



+1 (833) 383-8117

Text Message

Mon, Nov 2, 4:25 PM

Our records show you have requested a mail-in ballot but have not returned it! If you plan to vote in person please bring BOTH envelopes with you to vote. You can find your polling place: <http://securely.vote/6eok>

You can check the status of your mail-in ballot here: <http://securevote.gop/kx4g>

(Reply STOP to opt out)



Text Message



Exhibit 8



Name: Douglas W. Chew

Exhibit 9

DECLARATION OF CHRISTIAN LEINBACH

I, Christian Y. Leinbach, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that:

1. I am a citizen of the United States.
2. I am a Berks County Commissioner.
3. As a Berks County Commissioner, I am involved in the elections process in Berks County.
4. On November 2, 2020, our elections department received an email from Jonathan M. Marks, Deputy Secretary for Elections & Commissions with the subject "Important DOS Email – Clarification regarding Ballots Set Aside During Pre-Canvass." A copy of the email is attached as Exhibit "A."
5. After reviewing the law we determined that the election code does not authorize or address the action noted in the Nov. 2, 2020 communication from Jonathan Marks.
6. Berks County disagreed with the Department of State's guidance.
7. Berks County did not contact any voters or provide any voter information to party or candidate representatives.
8. Berks County chose not to follow the Department of State's Guidance.
9. All votes should count equally not only in Berks County, but in all counties across Pennsylvania.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 6, 2020


By: 
Christian Y. Leinbach

Exhibit 10

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR)	CIVIL ACTION
PRESIDENT, INC.; LAWRENCE)	
ROBERTS; and)	
DAVID JOHN HENRY;)	
)	
Plaintiffs,)	
)	
v.)	No. 20-CV-02078
)	
KATHY BOOCKVAR, in her capacity)	
as Secretary of the Commonwealth of)	
Pennsylvania; ALLEGHENY)	
COUNTY BOARD OF ELECTIONS;)	
CENTRE COUNTY BOARD OF)	
ELECTIONS; CHESTER COUNTY)	
BOARD OF ELECTIONS;)	
DELAWARE COUNTY BOARD OF)	
ELECTIONS; MONTGOMERY)	
COUNTY BOARD OF ELECTIONS;)	
NORTHAMPTON COUNTY BOARD)	
OF ELECTIONS; and)	
PHILADELPHIA COUNTY BOARD)	
OF ELECTIONS;)	
Defendants.		

SECOND AMENDED VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their undersigned counsel, hereby complain of Defendants as follows:

INTRODUCTION

1. American citizens deserve fair and unbiased elections. Every legal – not illegal – vote should be counted. And no government power, be it state or federal, may deny any American citizens the right to observe the process by which votes are cast, processed, and tabulated. We must protect our democracy with complete transparency.

2. Nothing less than the integrity of the 2020 Presidential election is at stake in this action. These Defendants are the very officials charged with ensuring the integrity of the election in Pennsylvania and have so mismanaged the election process that the public cannot have any faith that their most sacred and basic rights under the United States Constitution are being protected.

3. The evidence is plain that Defendants have blatantly violated the protections and procedures, including those enacted by the Pennsylvania General Assembly, vitally necessary to ensure that the votes of the citizens of Pennsylvania are not illegally diluted by invalid ballots and that the election is free and fair.

4. While the bedrock of American elections has been transparency, almost every critical aspect of Pennsylvania's November 3, 2020 General Election was effectively shrouded in secrecy. Democratic-majority controlled Defendant county board of elections provided political parties and candidates,

including the Trump Campaign, no meaningful access or actual opportunity to review and assess mail-in ballots during the pre-canvassing meetings in order to favor Joseph Biden over President Donald J. Trump.

5. Allegheny and Philadelphia Counties alone received and processed 682,479 mail-in and absentee ballots without review by the political parties and candidates. These are unprecedented numbers in Pennsylvania's elections history. Rather than engaging in an open and transparent process to give credibility to Pennsylvania's brand-new voting system, the processes were hidden during the receipt, review, opening, and tabulation of those 682,479 votes in direct contravention of the Election Code.

6. Allegheny and Pennsylvania counties conducted the canvassing and tabulation in convention center rooms and placed observers far away from the statutorily-required, witnessed verification procedures. In the case of Philadelphia County, when an emergency order was issued requiring them to provide meaningful access to representatives, Philadelphia failed to comply.

7. Incredibly the Pennsylvania Supreme Court¹ ruled, in a five to two November 17, 2020 Opinion that the Commonwealth's current definition of

¹ The Pennsylvania Supreme Court is elected through partisan elections and consists of five Democrats and two Republicans. It has authored at least three decisions in 2020 which are viewed as highly partisan, including this decision, in contradiction of briefing submitted by the Pennsylvania State Senate and House of Representatives explaining the meaning of statutes which they enacted, including laws enacted as recently as 2019. Under *Bush v. Gore*, this Court may choose not to follow these decisions and interpret Pennsylvania law independently.

“observer” under the state election code is hereby re-defined as “present in the same building.” The majority concluded that the Commonwealth “did not act contrary to law in fashioning its regulations governing the positioning of candidate representatives during the precanvassing and canvassing process, as the Election Code does not specify minimum distance parameters for the location of such representatives.” *In Re: Canvassing Operation Appeal of: City of Philadelphia Board of Elections*, PA Supreme Court, No. 30 EAP 2020 (November 17, 2020) at p. 19. The Pennsylvania Supreme Court now departs from Pennsylvania’s long-standing practice and concept of observers in the process in the middle of a Presidential election.

8. Democratic controlled counties violated the mandates of the Election Code and the determinations of the Pennsylvania Supreme Court, advantaging voters in Democratic-heavy counties as compared to those in Republican-heavy counties. Democratic controlled counties engaged in pre-canvass activities prior to November 3, 2020, by reviewing received mail-in ballots for deficiencies, such as lacking the inner secrecy envelope or lacking a signature of the elector on the outer declaration envelope. Those offending Counties then would notify those voters in order to allow them to cure their ballot deficiencies by voting provisionally on Election Day or cancelling their previously mailed ballot and issuing a replacement. In other words, those counties provided their mail-in

voters with the opportunity to cure mail-in and absentee ballot deficiencies, while Republican controlled counties followed the law and did not provide a notice and cure process.

9. Pennsylvania County Boards of Elections in Republican-leaning counties, such as York County, provided watchers and representatives of candidates and political parties, including without limitation watchers and representatives from both the Trump Campaign and the Biden Campaign, with appropriate access to view absentee and mail-in ballots being pre-canvassed and canvassed by those Boards and without restricting representatives by any county residency or Pennsylvania bar licensure requirements.

10. The commonality and statewide nature of these irregularities impacts the elections.

11. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). All citizens, including Pennsylvanians, have rights under the United States Constitution to the full, free, and accurate elections built upon transparency and verifiability. Citizens

are entitled – and deserve – to vote in a transparent system that is designed to protect against vote dilution.

12. As evidenced by numerous sworn statements, Defendants egregious misconduct has included ignoring legislative mandates concerning mail-in ballots – which amounted to over 2.6 million of the approximately 6.75 million votes in Pennsylvania – including the mandate that mail-in ballots be post-marked on or before Election Day, and critically, preventing Trump Campaign and other Republican poll watchers from observing the receipt, review, opening, and tabulation of mail-in ballots. Those mail-in ballots are evaluated on an entirely parallel track to those ballots cast in person.

13. On Election Day, when the Trump Campaign and other Republicans' poll watchers were present and allowed to observe in various polling locations throughout the Commonwealth, they observed and reported numerous instances of election workers failing to follow the statutory mandates relating to two critical requirements, among other issues: (1) a voter's right to spoil their mail-in ballot at their polling place on election day and to then vote in-person, and (2) the ability for voters to vote provisionally on election day when a mail-in ballot has already been received for them, but when they did not cast those mail-in ballots.

14. Additionally, Plaintiffs have learned that certain County Election Boards were mailing unsolicited mail-in ballots to voters even though they had not applied for a mail-in ballot for the General Election, thus resulting in voters who received two ballots. The offending counties also failed to undertake any effort to ensure destruction of the duplicate ballots.

15. The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is legally cast. The right to vote is infringed if a vote is cancelled or diluted by a fraudulent or illegal vote, including without limitation when a single person votes multiple times. The Supreme Court of the United States has made this clear in case after case. See, e.g., *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be “protected from the diluting effect of illegal ballots.”); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) (“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.”); accord *Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964). The disparate treatment of Pennsylvania voters, in subjecting one class of voters to greater burdens or scrutiny than another, violates Equal Protection guarantees because “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555.

16. In a rush to count mail ballots and ensure Democrat Joe Biden is elected, Pennsylvania created an illegal two-tiered voting system for the 2020 General Election, devaluing in-person votes. Voters who appeared at the polls were required to sign voter registrations, have those signatures checked against voter rolls, vote in a polling place monitored by statutorily authorized poll observers, and have their votes counted in a transparent and verifiable open and observed manner. By contrast, due to the arbitrary, unauthorized, and standardless actions of the Secretary of the Commonwealth of Pennsylvania, Kathy Boockvar, nearly 2.65 million votes were cast through a “mail in” process that lacked all of the hallmarks of transparency and verifiability that were present for in-person voters. In fact, Secretary Boockvar affirmatively excised nearly every element of transparency and verifiability. Among other things, the Secretary refused to require adequate verification of the voter’s identity. Rather than require votes to be received on the day of election, the Secretary permitted ballots received up to three days after the election to be counted without any evidence of timely mailing, such as a postmark. Finally, contrary to the in-person voting, which is open and transparent to the parties and the candidates, Defendants permitted review and counting mail-in ballots with no monitoring by the Trump witnesses. With the recent Opinion, the Pennsylvania Supreme Court joins these other elected and appointed officials in

re-interpreting the plain language of a statute that they distort the plain meaning of the verb: “to observe. Multiple branches of the Pennsylvania Government have now usurped the Pennsylvania legislature’s Constitutional role as promulgator of the rules for Presidential Electors. *In Re: Canvassing Operation Appeal of: City of Philadelphia Board of Elections*, PA Supreme Court, No. 30 EAP 2020 (November 17, 2020).

17. Through the arbitrary and illegal actions of the Secretary, Pennsylvania created a two-track system of voting resulting in voters being treated differently depending on how they chose to exercise their franchise. The first, marked by voters appearing personally at the polls complied with transparency and verifiability requirements of Pennsylvania Election Code. The second, marked by a mass of paper ballots received through the mail, was cloaked in darkness and complied with none of those transparency and verifiability requirements. This two-track election system not only violates Plaintiffs’ rights guaranteed by the United States Constitution, but also violates the structure of the Constitution that elections in the States must be carried out as directed solely by their respective legislatures and not by any other entity.

18. Accordingly, Plaintiffs seek an emergency order prohibiting Defendants from certifying the results of the Presidential General Election. In the alternative, Plaintiffs seek an emergency order prohibiting Defendants from

certifying any results from the Presidential General Election that included tabulation of absentee and mail-in ballots that do not comply with the Election Code, including, without limitation, tabulation of absentee and mail-in ballots Trump Campaign's watchers were prevented from observing or based on the tabulation of invalidly cast absentee and mail-in ballots that (i) lack a secrecy envelope, or contain on such envelope any text, mark, or symbol that reveals the elector's identity, political affiliation, or candidate preference; (ii) do not include on the outside envelope a completed declaration dated and signed by the elector or; (iii) are delivered in-person by third parties for non-disabled voters.

Ultimately, Plaintiffs seeks a permanent injunction requiring the County Election Boards to invalidate ballots cast by voters in violation of the Pennsylvania election code, including voters who were improperly given an opportunity to cure and voters whose mail ballots did not comply with Pennsylvania's stringent requirements for signatures, dates, and secrecy ballots – ballots which the Trump Campaign and other Republican observers could not observe because they were excluded from observation. The Trump Campaign believes that statistical analysis will evidence that over 70,000 mail and other mail ballots which favor Biden were improperly counted – sufficient to turn the election – a remedy expressly applied in *Marks v. Stinson*, Civ. A. No. 93-6157,

1994 U.S. Dist. LEXIS 5273, at *78 (E.D. Pa. Apr. 26, 1994) which was later affirmed without opinion by the Third Circuit Court of Appeals.

JURISDICTION AND VENUE

19. Under 28 U.S.C. §§ 1331 & 1343, this Court has subject matter jurisdiction because this action arises under the Constitution and laws of the United States and involves a federal election for President of the United States. “A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.” *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365 (1932). Also, this Court has supplemental jurisdiction over any state law claims under 28 U.S.C. § 1367.

20. Venue is proper because a substantial part of the events giving rise to the claims occurred in this District, and certain of the Defendants reside in this District and all of the Defendants are residents of the Commonwealth of Pennsylvania in which this District is located. 28 U.S.C. § 1391(b) & (c).

PARTIES

21. Plaintiff Donald J. Trump for President, Inc. (hereinafter, the “Trump Campaign”), is the principal committee for the reelection campaign of Donald J. Trump, the 45th President of the United States of America (hereinafter, “President Trump”). President Trump is the Republican nominee for the office

of the President of the United States of America in the November 3, 2020 General Election. The Trump Campaign brings this action for itself and on behalf of its candidate, President Trump. As a political committee for a federal candidate, the Trump Campaign has Article III standing to bring this action. See, e.g., *Orloski v. Davis*, 564 F. Supp. 526, 530-31 (M.D. Pa. 1983). See also *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587-588 (5th Cir. 2006) (“[A]fter the primary election, a candidate steps into the shoes of his party, and their interests are identical.”); *In re General Election- 1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987) (A candidate for office in the election at issue suffers a direct and substantial harm sufficient for standing to contest the manner in which an election will be conducted). As a direct and proximate result of the actions of the Defendants and each of them, the Trump Campaign has been injured in a way that concretely impacted its rights under the Fourteenth Amendment Due Process Clause; the Fourteenth Amendment Equal Protection Clause; the Elections Clause of Article I, § 4; and the Electors Clause of Article II, § 1 of the Constitution of the United States as more fully set forth herein.

22. Plaintiff David John Henry (hereinafter, “Mr. Henry”) is an adult individual who is a qualified registered elector residing in West Hempfield Township, Lancaster County, Pennsylvania. Mr. Henry constitutes a “qualified elector” as that term is defined in Election Code Section 102(t), 25 P.S. §

2602(t), and has brought this matter not only as a private citizen and “qualified elector” but also, and more importantly, as an injured party. As a qualified elector, registered voter and injured party, Mr. Henry has Article III standing to bring this action. See *Orloski*, 564 F. Supp. at 530; *Pierce*, 324 F. Supp. 2d at 692-93. As a direct and proximate result of the actions of the Defendants and each of them, the Mr. Henry has been injured in a way that concretely impacted his rights under the Fourteenth Amendment Due Process Clause; the Fourteenth Amendment Equal Protection Clause of the Constitution of the United States as more fully set forth herein.

23. Plaintiff Lawrence Roberts (hereinafter, “Mr. Roberts”) is an adult individual who is a qualified registered elector residing in Uniontown, Fayette County, Pennsylvania. Mr. Roberts constitutes a “qualified elector” as that term is defined in Election Code Section 102(t), 25 P.S. § 2602(t) and has brought this matter not only as a private citizen and “qualified elector” but also, and more importantly, as an injured party. As a qualified elector, registered voter and injured party, Mr. Roberts has Article III standing to bring this action. See *Orloski*, 564 F. Supp. at 530; *Pierce*, 324 F. Supp. 2d at 692-93. As a direct and proximate result of the actions of the Defendants and each of them, the Mr. Roberts has been injured in a way that concretely impacted his rights under the Fourteenth Amendment Due Process Clause; the Fourteenth Amendment Equal

Protection Clause of the Constitution of the United States as more fully set forth herein.

24. Defendant Secretary Boockvar (hereinafter, “Secretary Boockvar”) is the Secretary of the Commonwealth. In this role, Secretary Boockvar leads the Pennsylvania Department of State. As Secretary, she is Pennsylvania’s Chief Elections Officer and a member of the Governor’s Executive Board. The Pennsylvania Constitution vests no powers or duties in Secretary Boockvar. *Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005). Instead, her general powers and duties concerning elections are set forth in Election Code Section 201, 25 P.S. § 2621. Under the Election Code, Secretary Boockvar acts primarily in a ministerial capacity and has no power or authority to intrude upon the province of the Pennsylvania General Assembly. *Perzel*, 870 A.2d at 764; *Hamilton v. Johnson*, 141 A. 846, 847 (Pa. 1928). Secretary Boockvar is sued in her official capacity.

25. Defendants Allegheny, Centre, Chester, Delaware, Philadelphia, Montgomery, and Northampton County Board of Elections (collectively hereinafter, the “County Election Boards”) are the county boards of elections in and for the aforementioned counties of the Commonwealth of Pennsylvania as provided by Election Code Section 301, 25 P.S. § 2641. The County Election Boards “have jurisdiction over the conduct of primaries and elections in such

count[ies], in accordance with the provision of [the Election Code.]” Id. at § 2641(a). The County Election Boards’ general powers and duties are set forth in Election Code Section 302, 25 P.S. § 2642. The County Election Boards are executive agencies that carry out legislative mandates, and their duties concerning the conduct of elections are purely ministerial with no exercise of discretion. *Shroyer v. Thomas*, 81 A.2d 435, 437 (Pa. 1951); *Perles v. Hoffman*, 213 A.2d 781, 786 (Pa. 1965) (Cohen, J., concurring). See also *Deer Creek Drainage Basin Authority v. County Bd. of Elections*, 381 A.2d 103, 109 (Pa. 1977) (Pomeroy, J., dissenting) (“A board of elections, it has been well said, “does not sit as a quasi-judicial body adjudicating contending forces as it wishes, but rather as an executive agency to carry out legislative mandates. Its duties are ministerial only.”); *In re Municipal Reapportionment of Township of Haverford*, 873 A.2d 821, 833, n.18 (Pa. Commw. Ct. 2005) (“The duties of a board of elections under the Election Code are ministerial and allow for no exercise of discretion.”), *appeal denied* 897 A.2d 462 (Pa. 2006).

FACTUAL ALLEGATIONS

I. Federal Constitutional Protections for Free and Fair Public Elections.

26. Free, fair, and transparent public elections are crucial to democracy – a government of the people, by the people, and for the people.

27. In statewide elections involving federal candidates, “a State’s regulatory authority springs directly from the United States Constitution.” *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 174 (W.D. Pa. 2011) (citing *Cook v. Gralike*, 531 U.S. 510, 522-23 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995)).

28. The Elections Clause of the United States Constitution states that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” U.S. Const. Art. I, § 4, cl. 1 (emphasis added). Likewise, the Electors Clause of the United States Constitution states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” for President. U.S. Const. Art. II, § 1, cl. 2 (emphasis added).

29. The Legislature is “the representative body which ma[kes] the laws of the people.” *Smiley* 285 U.S. 365. Regulations of congressional and presidential elections, thus, “must be in accordance with the method which the state has prescribed for legislative enactments.” *Id.* at 367; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 135 S. Ct. 2652, 2668 (U.S. 2015).

30. In Pennsylvania, the “legislature” is the General Assembly. Pa. Const. Art. II, § 1. See also *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (“The power

to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government.”); *Patterson v. Barlow*, 60 Pa. 54, 75 (1869) (“It is admitted that the Constitution cannot execute itself, and that the power to regulate elections is a legislative one, which has always been exercised by the General Assembly since the foundation of the government.”).

31. Because the United States Constitution reserves for state legislatures alone the power to set the time, place, and manner of holding elections for Congress and the President, state executive officers, including but not limited to Secretary Boockvar, have no authority to unilaterally exercise that power, much less flout existing legislation.

32. Nor can the authority to ignore existing legislation be delegated to an executive officer. While the Elections Clause “was not adopted to diminish a State’s authority to determine its own lawmaking processes,” *Ariz. State Legislature*, 135 S. Ct. at 2677, it does hold states accountable to their chosen processes when it comes to regulating federal elections. *Id.* at 2668. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.” *Bush*, 531 U.S. at 113 (Rehnquist, J., concurring); *Smiley*, 285 U.S. at 365.

II. Actual Observation by Watchers and Representatives Ensures Free and Fair Public Elections.

33. Elections in Pennsylvania are governed and regulated by the Pennsylvania Election Code. “Although the [Commonwealth] is ultimately responsible for the conduct and organization of elections, the statutory scheme [promulgated by the Election Code] delegates aspects of that responsibility to the political parties. This delegation is a legislative recognition of ‘the critical role played by political parties in the process of selecting and electing candidates for state and national office.’” *Tiryak v. Jordan*, 472 F. Supp. 822, 823-24 (E.D. Pa. 1979) (quoting *Marchioro v. Chaney*, 442 U.S. 191, 195 (1979)). “Pennsylvania’s election laws apply equally to federal and state elections.” *Project Vote*, 805 F. Supp. 2d at 174 (citing *Kuznik v. Westmoreland County Board of Elections*, 902 A.2d 476, 490- 93 (Pa. 2006)).

34. The United States Supreme Court has noted: “[S]unlight,” as has so often been observed, “is the most powerful of all disinfectants.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964).

35. The Pennsylvania General Assembly understood that sentiment long ago and intertwined the concept of watching with the act of voting, enshrining transparency, sunlight and accountability into the process in which Pennsylvanians choose elected officials. After all, reasonable people cannot dispute that “openness of the voting process helps prevent election fraud, voter

intimidation, and various other kinds of electoral evils.” *PG Publishing Co. v. Aichele*, 705 F.3d 91, 111 (3d Cir. 2013).

36. As long as Pennsylvania has had an Election Code, it has had watchers. In 1937, the Pennsylvania General Assembly included the concept of “watchers” in the then-newly enacted Pennsylvania Election Code, a statutory scheme addressing the administration of elections in the Commonwealth. See 25 P.S. §§ 2600, et. seq.

37. As it exists today, Election Code Section 417, codified at 25 P.S. § 2687, creates the position of watcher and entrusts to each candidate for nomination or election at any election, and each political party and each political body which has nominated candidates for such elections, the power to appoint watchers to serve in each election district in the Commonwealth. See 25 P.S. § 2687(a).

38. Under the Election Code, “poll watcher[s] perform[] a dual function on Election Day. On the one hand, because [watchers] are designated by [candidates, political parties, and/or political bodies], [their] job is to guard the interests of [their] candidates [or political parties or bodies]. On the other hand, because the exercise of [their] authority promotes a free and fair election, poll watcher[s] serve to guard the integrity of the vote. Protecting the purity of the electoral process is a state responsibility and [watchers’] statutory role in

providing that protection involves [them] in a public activity, regardless of [their] private political motives.” *Tiryak*, 472 F. Supp. at 824.

39. Under Election Code Section 417(b), poll watchers may observe the election process from the time the first polling place official appears in the morning to open the polling place until the time the polls are closed and the election returns are counted and posted at the polling place entrance. 25 P.S. § 2687(b). However, until the polls close, only one pole watcher representing each political party and its candidates at a general, municipal, or special election can be present in the polling place outside the enclosed space from the time that the election officers meet to open the polls and until the counting of the votes is complete. *Id.* See also Election Code Section 1220, 25 P.S. § 3060(a) & (d). Once the polls close and while the ballots are being counted, then all the watchers for candidates and political parties or bodies are permitted to be in the polling place outside the enclosed space. 25 P.S. § 2687(b).

40. In addition to the activities authorized by Election Code Section 417(b), poll watchers are among those who are authorized under Election Code Section 1210(d), 25 P.S. § 3050(d), to challenge any person who presents himself or herself to vote at a polling place on Election Day concerning the voter’s identity, continued residence in the election district, or registration status. See 25 P.S. § 3050(d) (“any person, although personally registered as an

elector, may be challenged by any qualified elector, election officer, overseer, or watcher at any primary or election as to his identity, as to his continued residence in the election district or as to any alleged violation of the provisions of section 1210 of this act, ...”) (emphasis added).

41. Also, poll watchers are authorized under Election Code Section 1308(b), 25 P.S. § 3146.8(b), to be present when the envelopes containing absentee and mail-in ballots are opened, counted, and recorded. 25 P.S. § 3146.8(b).

42. Moreover, watchers’ functions go beyond the activities authorized under Election Code Sections 417(b) and 1210(d) on Election Day.

43. For example, under Election Code Section 310, 25 P.S. § 2650, poll watchers appointed by parties, political bodies, or bodies of citizens may appear “at any public session or sessions of the county board of elections,” and “at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines,” in which case such poll watchers may exercise the same rights as watchers at polling places and may raise objections to any ballots or machines for subsequent resolution by the county board of elections and appeal to the courts. 25 P.S. § 2650(a) & (c).

44. In addition to poll watchers, the Election Code permits “representatives” of candidates and political parties to be involved in the pre-

canvassing and canvassing of absentee and mail-in ballots. See 25 P.S. § 3146.8(g)(1.1) & (2).

45. The Election Code also authorizes “representatives” of candidates and political parties to be present when provisional ballots are examined to determine if the individuals voting such ballots are entitled to vote at the election districts in the election. See 25 P.S. § 3050(a.4)(4).

46. Election Code Section 417(b) provides that to be a poll watcher, a person must be “a qualified registered elector of the county in which the election district for which the watcher [is] appointed is located.” 25 P.S. § 2687(b).

47. Without poll watchers and representatives, the integrity of the vote in elections is threatened and the constitutional right to free and fair public elections under the United States Constitution is denied.

48. Poll watchers and representatives serve as an important check to ensure transparency and guard against inconsistencies and other wrongdoing by election officials.

49. The need for poll watchers and representatives is demonstrated by the case of *United States v. DeMuro*, Criminal No. 20-112 (E.D. Pa. unsealed May 21, 2020). In that case, a former Judge of Elections in South Philadelphia pled guilty to adding fraudulent votes to the voting machines during Election Day –

also known as “ringing up” votes – and then falsely certifying that the voting machine results were accurate for specific federal, state, and local Democratic candidates in the 2014, 2015, and 2016 primary elections. The scheme involved a political consultant who purportedly solicited monetary payments from the candidates as “consulting fees,” and then used portions of those funds to pay election board officials, including DeMuro, in return for ringing up votes.

DeMuro was able to commit the fraud because there were no poll watchers at his precinct. See *United States v. DeMuro*, Criminal No. 20-112, Information (Doc. #1) (E.D. Pa Mar. 03, 2020); M. Cavacini, “U.S. Attorney William M. McSwain Announces Charges and Guilty Plea of Former Philadelphia Judge of Elections Who Committed Election Fraud,” U.S. Attys. Office – Pa., Eastern (May 21, 2020) (available at <https://www.justice.gov/usao-edpa/pr/us-attorney-william-m-mcswain-announcescharges-and-guilty-plea-former-philadelphia>).

50. The importance of poll watchers and representatives serving as an important check in elections is recognized internationally. The International Institute for Democracy and Electoral Assistance issued a publication in 2002 called the *International Electoral Standards: Guidelines for Review the Legal Framework of Elections*. The purpose of the International IDEA standards is to be “used as benchmarks to assess whether or not an election is free and fair.” *International Electoral Standards* at v; see also *id.* at 6 (“These international

standards are relevant to each component, and necessary for the legal framework to be able to ensure democratic elections. This publication is intended to identify electoral standards which contribute to uniformity, reliability, consistency, accuracy and overall professionalism in elections.”). The sources for the Standards include numerous international Declarations, Charters, and Conventions, including many to which the U.S. is a signatory. See *Id.* at 7.

51. In contrast to the 2002 International Electoral Standards, *Id.*, the Pennsylvania Supreme court has struck out in a unique direction among democracies and declared that meaningful observers are not part of verification and votes may be counted without any review by political campaigns and parties. *In Re: Canvassing Operation Appeal of: City of Philadelphia Board of Elections*, PA Supreme Court, No. 30 EAP 2020 (November 17, 2020).

52. As it relates to ballot counting and tabulation, the Standards set out as a general principle:

A fair, honest and transparent vote count is a cornerstone of democratic elections. This requires that votes be counted, tabulated and consolidated in the presence of the representatives of parties and candidates and election observers, and that the entire process by which a winner is determined is fully and completely open to public scrutiny.

Standards, at 77.

53. “Regardless of whether ballots are counted at the polling station or at a central counting location or at both places, the representatives of parties and candidates and election observers should be permitted to remain present on this occasion.” *Id.* at 78.

54. “The legal framework for elections should clearly specify that the representatives of parties and candidates and election observers be given, as far as practicable, certified copies of tabulation and tally sheets.” *Id.* at 78. “As a necessary safeguard of the integrity and transparency of the election, the legal framework must contain a provision for representatives nominated by parties and candidates contesting the election to observe all voting processes.” *Id.* at 83.

55. “[T]he representatives of parties and candidates should have the right to immediately query decisions made by polling officials or the implementation of voting procedures” *Id.* at 84. Per the Standards, representatives of parties and candidates should be permitted “[t]o observe all activity – with the exception of the marking of ballots by voters – within the polling station, from the check counting of ballots and sealing of ballot boxes prior to the commencement of voting to the final packaging of material after close of voting; [t]o challenge the right of any person to vote; [and t]o query any decisions made by polling officials with the polling station[,] committee

president and election management officials.” *Id.* at 85. “The legal framework must also be clear and precise concerning what a domestic observer may not do, for instance, interfere with voting, take a direct part in the voting or counting processes, or attempt to determine how a voter will vote or has voted. It should strike a balance between the rights of observers and the orderly administration of the election processes. But in no case should it hinder legitimate observation, ‘muzzle’ observers, or prevent them from reporting or releasing information that has been obtained through their observations.” *Id.* at 90.

III. The Perils of an Unmonitored Mail-In Voting System.

56. Failing to uphold and ensure the adherence to even basic transparency measures or safeguards against the casting of illegal or unreliable ballots creates an obvious opportunity for ineligible voters to cast ballots, results in fraud, and undermines the public’s confidence in the integrity of elections — all of which violate the fundamental right to vote, the guarantee of equal protection, and the right to participate in free, fair, and transparent elections as guaranteed by the United States Constitution.

57. If a state fails to follow even basic integrity and transparency measures — especially its own — it violates the right to free, fair, and transparent public elections because its elections are no longer meaningfully public and the State has functionally denied its voters a fair election.

58. “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 195-96 (plurality op. of Stevens, J.). As the Commission on Federal Election Reform – a bipartisan commission chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, and cited extensively by the United States Supreme Court – observed, “the ‘electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.’” *Building Confidence in U.S. Election, Report of the Commission on Federal Election Reform*, p. 46 (Sept. 2005) (available at <https://bit.ly/3dXH7rU>, and referred to and incorporated herein by reference) (hereinafter, the “Carter-Baker Report”).

59. According to the Carter-Baker Report, mail-in voting is “the largest source of potential voter fraud.” *Carter-Baker Report*, p. 46.

60. Many well-regarded commissions and groups of diverse political affiliation agree that “when election fraud occurs, it usually arises from absentee ballots.” Michael T. Morley, *Election Emergency Redlines*, p. 2 (Mar. 31, 2020) (available at <https://ssrn.com/abstract=3564829> or <http://dx.doi.org/10.2139/ssrn.3564829>, and referred to and incorporated herein by reference) (hereinafter, “Morley, Redlines”). Such fraud is easier to commit

and harder to detect. As one federal court put it, “absentee voting is to voting in person as a take-home exam is to a proctored one.” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). See also *id.* at 1130-31 (voting fraud is a “serious problem” and is “facilitated by absentee voting.”).

61. Courts have repeatedly found that mail-in ballots are particularly susceptible to fraud. As Justice Stevens has noted, “flagrant examples of [voter] fraud ... have been documented throughout this Nation’s history by respected historians and journalists,” and “the risk of voter fraud” is “real” and “could affect the outcome of a close election.” *Crawford*, 553 U.S. at 195-96 (plurality op. of Stevens, J.) (collecting examples). Similarly, Justice Souter observed that mail-in voting is “less reliable” than in-person voting. *Crawford*, 553 U.S. at 212, n.4 (Souter, J., dissenting) (“[E]lection officials routinely reject absentee ballots on suspicion of forgery.”); *id.* at 225 (“[A]bsentee-ballot fraud . . . is a documented problem in Indiana.”). See also *Veasey v. Abbott*, 830 F.3d 216, 239, 256 (5th Cir. 2016) (en banc) (“[M]ail-in ballot fraud is a significant threat” — so much so that “the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting.”). See also *id.* at 263 (“[M]ail-in voting . . . is far more vulnerable to fraud.”); *id.* (recognizing “the far more prevalent issue of fraudulent absentee ballots”).

62. Pennsylvania is not immune to mail-in ballot fraud. For example, in 1999, former Representative Austin J. Murphy was indicted by a Fayette County grand jury and then convicted of absentee ballot fraud for forging absentee ballots for residents of a nursing home and adding his wife as a write-in candidate for township election judge. See B. Heltzel, “*Six of seven charges against Austin Murphy dismissed*,” Pittsburgh Post-Gazette (June 22, 1999) (available at <http://old.post-gazette.com/regionstate/19990622murphy6.asp>, and referred to and incorporated herein by reference). Similarly, in 2014, Richard Allen Toney, the former police chief of Harmar Township in Allegheny County pleaded guilty to illegally soliciting absentee ballots to benefit his wife and her running mate in the 2009 Democratic primary for town council. See T. Ove, “Ex-Harmar police chief pleads guilty to ballot tampering,” Pittsburgh Post-Gazette (Sept. 26, 2014) (available at <https://www.post-gazette.com/local/north/2014/09/26/Ex-Harmarpolice-chief-pleads-guilty-to-ballot-tampering-Toney/stories/201409260172>, and referred to and incorporated herein by reference). Further, in 2015, Eugene Gallagher pled guilty to unlawfully persuading residents and non-residents of Taylor in Lackawanna County to register for absentee ballots and cast them for him during his councilman candidacy in the November 2013 election. See J. Kohut, “Gallagher resigns from Taylor council, pleads guilty to three charges,” The Times-Tribune

(Apr. 3, 2015) (available at https://www.thetimes-tribune.com/news/gallagherresigns-from-taylor-council-pleads-guilty-to-three-charges/article_e3d45edb-fe99-525c-b3f9-a0fc2d86c92f.html, and referred to and incorporated herein by reference). See also *Commonwealth v. Bailey*, 775 A.2d 881, 886 (Pa. Commw. Ct. 2001) (upholding defendant’s conviction for absentee ballot violations, holding that a county district attorney has jurisdiction to prosecute such claims even in the absence of an investigation and referral by the Bucks County elections board); *In re Center Township Democratic Party Supervisor Primary Election*, 4 Pa . D. & C.4th 555, 557-563 (Pa. Ct. Com. Pl. Beaver 1989) (court ordered a run-off election after evidence proved that fifteen absentee ballots were applied for and cast by non- existent individuals whose applications and ballots were handled by a political ally of the purported winner).

63. As part of the November 3, 2020 General Election, at least two Counties had suspected instances of mail-in ballot fraud. Fayette County experienced two different issues with their mail-in ballots leading up to Election Day. First, an issue caused by Pennsylvania’s SURE software system as to the marking of online applications submitted prior to the June primary election with the “permanent mail-in” status caused some voters to receive duplicate ballots for the general election. See <https://www.wpxi.com/news/top-stories/election->

officialsworking- correct-mail-in-ballot-problems-fayette
 county/NH5DSEM7EVE7LGZLMAN4CS52YE/. Prior to November 3, 2020,
 Fayette County uncovered an incident involving two voters who received mail-
 in ballots that were already filled out and two ballots that were found at the
 election bureau already opened with the secrecy envelope and the ballot missing
 out of those envelopes. Ballots already filled out arrived at homes 40 miles
 apart. See <https://www.wtae.com/article/fayette-co-prosecutors-investigating-reports-ofvoters-receiving-mail-in-ballots-already-filled-out/34527256>. In late
 September 2020, officials in Luzerne County discovered that a temporary
 seasonal elections worker had discarded into a trash bin nine (9) military ballots
 received in unmarked envelopes, seven (7) of which were all cast for President
 Trump. See <https://www.wgal.com/article/federal-authorities-investigate-discarded-ballots-inluzerne-county-pennsylvania/34162209#>.

64. This risk of abuse by absentee or mail-in voting is magnified by the
 fact that “many states’ voter registration databases are outdated or inaccurate.”
 Morley, Redlines, p. 2. A 2012 study from the Pew Center on the States –
 which the U.S. Supreme Court cited in a recent case - found that
 “[a]pproximately 24 million – one of every eight – voter registrations in the
 United States are no longer valid or are significantly inaccurate”; “[m]ore than
 1.8 million deceased individuals are listed as voters”; and “[a]pproximately

2.75 million people have registrations in more than one state.” See *Pew Center on the States, Election Initiatives Issue Brief, “Inaccurate, Costly, and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade,”* (Feb. 2012) (available at <https://www.issuelab.org/resources/13005/13005.pdf>, and referred to and incorporated herein by reference) (cited in *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (U.S. 2018)).

65. Crucially as it pertains to Pennsylvania’s registered voters, as recently as December 2019, the Auditor General of Pennsylvania, Eugene DePasquale, determined through an audit of Pennsylvania’s Statewide Uniform Registry of Electors (“SURE”), administered by the Department of State, that there are more than 50,000 cases of potentially inaccurate voter records. The Performance Audit Report noted that the audit “found too many instances of potentially bad data and sloppy recordkeeping.” See <https://www.paauditor.gov/press-releases/auditorgeneral-depasquale-issues-audit-of-voter-registration-system-calls-for-changes-atpennsylvania-department-of-state>; https://www.paauditor.gov/Media/Default/Reports/Department%20of%20State_SURE%20Audit%20Report%2012-19-19.pdf. The Department of State was provided 50 recommendations to strengthen their policies and management controls, one of which was to work

with counties to resolve records management issues such a duplicative voter records. See *id.* Mr. DePasquale criticized the Pennsylvania Department of State for its “lack of cooperation and a failure to provide the necessary information” during the audit, including the “denial of access to critical documents and excessive redaction of documentation.” *Id.* As a result, the Auditor General was “unable to establish with any degrees of reasonable assurance that the SURE system is secure and that Pennsylvania voter registration records are complete, accurate and in compliance with applicable laws, regulations, and related guidelines.” *Id.*

66. Because of its inherent risk, absentee and mail-in voting is an election process that requires adequate procedural safeguards to deter fraud and ensure transparency.

67. One procedural safeguard that any absentee or mail-in ballot voting system must have is the ability of candidates, political parties, and the public at large to engage in meaningful, effective, and actual observation of the inspection, opening, counting, and recording of absentee and mail-in ballots in order to ensure that the election officers are uniformly applying the same rules and procedures to all absentee and mail-in voters and that only legitimately cast votes are counted and recorded.

68. **IV. Pennsylvania Enacts All-Voter Mail-in Voting.**

69. The Pennsylvania General Assembly may enact laws governing the conduct of elections. *Winston*, 91 A. at 522. However, no legislative enactment may contravene the United States Constitution. U.S. CONST. art. VI; *Shankey v. Staisey*, 257 A. 2d 897, 898 (Pa.), *cert. denied* 396 U.S. 1038 (1970).

70. “Prior to the year 1957, the Pennsylvania Constitution permitted absentee voting only by individuals engaged in actual military service (Art. 8, § 6 of the Pennsylvania Constitution (1874)), and by bedridden or hospitalized veterans (Art. 8, § 18 added to the Pennsylvania Constitution (1949)).” *Absentee Ballots Case*, 224 A.2d 197, 199 (Pa. 1966).

71. In 1957, the Pennsylvania Constitution was further amended to permit absentee voting for those “qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee[.]” Pa. Const. art. VII, § 14.

72. In 1960, the Election Code was amended to implement the 1957 amendment to the Pennsylvania Constitution. *Absentee Ballots Case*, 224 A.2d

at 200. See also The Act of January 8, 1960, entitled “*An Act amending the Act of June 3, 1937,*” P.L. 2135, 25 P.S. §§ 3149.1-3149.9 (Supp. 1960).

73. “Absentee voting has consistently been regarded by the Pennsylvania courts as an extraordinary procedure in which the safeguards of the ordinary election process are absent.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d 419, 420 (Pa. Ct. Com. Pl. Phila. 1964).

74. Specifically, “in the casting of an absentee ballot, the ordinary safeguards of a confrontation of the voter by the election officials and watchers for the respective parties and candidates at the polling place are absent.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d at 420.

75. Because “it is fraught with evils and frequently results in void votes,” Pennsylvania’s laws regarding absentee voting are “strictly construed and the rights created thereunder not extended beyond the plain and obvious intention of the act.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d at 420-21 (citing *Decision of County Board of Elections*, 29 D.&C.2d 499, 506-7 (Pa. Ct. Com. Pl. 1962)). See also *Marks v. Stinson*, Civ. A. No. 93-6157, 1994 U.S. Dist. LEXIS 5273, at *78 (E.D. Pa. Apr. 26, 1994) on remand, *Marks v. Stinson*, 19 F.3d 873 (1994).

76. Moreover, consistent with Pennsylvania’s Statutory Construction Act, the Election Code’s use of the word “shall” to identify the manner and other “technicalities” that an elector must follow to cast an absentee ballot are “substantive provisions” that are necessary to “safeguard against fraud” and preserve the “secrecy and the sanctity of the ballot and must therefore be observed,” and ballots cast “in contravention of [such] mandatory provision[s] are void.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231-34 (Pa. 2004).

77. On October 31, 2019, the Pennsylvania General Assembly enacted Act 77. See Act 2019-77 (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019.

78. Act 77 fundamentally changed the administration of elections in the Commonwealth of Pennsylvania in that, for the first time in its history, qualified Pennsylvania electors now have the choice to vote by mail, rather than in person on Election Day, without providing a reason or excuse. See, e.g., 25 P.S. §§ 3150.11- 3150.17; see also *Pa. Dem. Party v. Boockvar*, Case No. 133 MM 2020, 2020 Pa. LEXIS 4872, at * 1 (Pa. Sept. 27, 2020). Previously, the law offered electors who could not vote in person on the designated Election Day the ability to apply for and receive an absentee ballot, verifying they qualified based on a limited number of excuses outlined in the statute.

Pennsylvania held its first election under Act 77's no excuse mail-in ballot scheme during the Primary Election held on June 2, 2020. The November 3, 2020 election was the first General Election in Pennsylvania under the state's new mail-in voting scheme.

79. Mail-in ballots are not automatically sent to electors in Pennsylvania. The Election Code requires that a person applying for both an absentee and a mail-in ballot complete a form with various information and sign the application. See 25 P.S. § 3146.2(a)–(e); (the absentee ballot application “shall be signed by the applicant”); 25 P.S. § 3150.12(a)–(d); 25 P.S. § 3146.2(d) (except as not relevant here, “the application [for a mail-in ballot] shall be signed by the applicant.”). The only exception to the signature requirement is for military, overseas and disabled voters. *Id.*

80. Other than the signature requirement, there is no other proof of identification required to be submitted with the ballot applications. See generally 25 P.S. § 3146.2; 25 P.S. § 3150.12. When those ballots are being reviewed for approval, the board of elections is required to both (i) compare the information provided on the application with the information contained on the voter's permanent card and (ii) verify the proof of identification. See 25 P.S. § 3146.2b(c); 25 P.S. § 3150.12b(a). The board of elections' signature

verification on the application is the only means available to it to verify the identity of the voter.

81. For both absentee and mail-in voting, Act 77 retains the requirement that “the [non-disabled] elector shall send [his or her absentee or mail-in ballot] by mail, postage prepaid, except where franked, or delivered it in person to [the] county board of elections,” in order for the ballot to be properly cast under Act 77. 25 P.S. §§ 3146.6(a)& 3150.16(a). Accordingly, as it did prior to the enactment of Act 77, the Election Code bars ballot harvesting of absentee and mail-in ballots cast by nondisabled voters. See *Crossey v. Boockvar*, Case No. 108 MM 2020, 2020 Pa. LEXIS 4868, at *4 (Pa., Sept. 17, 2020) (“It has long been the law of this Commonwealth, per 25 P.S. § 3146.6(a), that third-person delivery of absentee ballots is not permitted. Act 77 adds a substantially identical provision for mail-in ballots, which we likewise conclude forbids third-party delivery of mail-in votes.”) (citations omitted); *Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234 (“[W]e hold that Section 3146.6(a)’s ‘in person’ delivery requirement is mandatory, and that the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are void.”); *Marks*, 1994 U.S. Dist. LEXIS 5273 at *83.

82. Also, for both absentee and mail-in voting, Act 77 retains the requirement that an elector must comply with the following additional mandatory requirements for such ballot to be properly cast:

[T]he [non-disabled] elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope.

25 P.S. §§ 3146.6(a)& 3150.16(a).

83. Moreover, as it did prior to the enactment of Act 77, the Election Code bars counting absentee or mail-in ballot that either lacks an “Official Election Ballot,” or contains on that envelope “any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference,” or fails to contain a completed declaration signed and dated by the elector. Election Code Sections 1306.6(a) and 1308(g)(i)-(iv), 25 P.S. §§ 3146.6(a) & 3146.8(g)(4)(i)-(iv).

84. These provisions in the Election Code, as amended by Act 77, which identify exactly what an elector “shall” do to properly vote absentee or mail-in ballot to ensure the secrecy of such ballots and to prevent fraud. See *Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1232. See also *id.* at 1234

(the Election Code’s provisions of how to cast an absentee ballot are “substantive matters—how to cast a reliable vote—and not [] a mere procedural matter” that can be disregarded by a county board of elections); *Appeal of Yerger*, 333 A.2d 902, 907 (Pa. 1975) (the validity of a ballot must first be ascertained before any factual inquiry into the intention of the voter); *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954) (“[V]iolations of substantive provisions of the [Election] Code cannot be overlooked on the pretext of pursuing a liberal construction.”).

85. Importantly, the Pennsylvania Supreme Court recently reaffirmed that “ballots that voters have filled out incompletely or incorrectly” shall be set aside and declared void, and election boards are not permitted to afford these voters a “notice and opportunity to cure” procedure to remedy such defects. *Boockvar*, 2020 Pa. LEXIS 4872 at *55. The *Boockvar* Court further concluded “that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.” *Id.* at *73 (emphasis added).

86. However, in contrast to prior provisions of the Election Code, all absentee and mail-in ballots are no longer sent to polling places on Election Day and are no longer inspected by the local election boards or subject to challenge by watchers at the polling places. Instead, Act 77 mandates that all properly cast absentee and mail-in ballots are to be “safely ke[pt] . . . in sealed

or locked containers” at the county boards of elections until they are canvassed by the county elections boards. Election Code Section 1308(a), 25 P.S. § 3146.8(a).

87. Additionally, Act 77 requires that “no earlier than seven o’clock (0700) A.M. on election day,” the county boards of elections shall meet to conduct a pre-canvass of all absentee and mail-in ballots received to that meeting. Election Code Section 1308(g)(1.1), 25 P.S. § 3146.8(g)(1.1). During the pre-canvass, the election officials shall inspect and open the envelopes of all absentee and mail-in ballots, remove such ballots from such envelopes, and count, compute and tally the votes reflected on such ballots. However, as part of the pre-canvass, the county election boards are prohibited from recording or publishing the votes reflected on the ballots that are pre-canvassed. Election Code 102(q.1), 25 P.S. § 2602(q.1).

88. Further, contrary to prior provisions of the Election Code, Act 77 mandates that the county boards of elections are to meet no earlier than the close of polls on Election Day and no later than the third day following the election to begin canvassing absentee and mail-in ballots. See Election Code Section 1308(g)(2), 25 P.S. § 3146.8(g)(2). However, unlike a pre-canvass, the election officials during a canvass are permitted to record and publish the votes reflected on the ballots. See Election Code 102(a.1), 25 P.S. § 2602(a.1).

89. Act 77 prohibits an elector from casting both an absentee or mail-in ballot and in-person ballot, whether as a regular or provisional ballot. Specifically, Act 77 provides: Any elector who receives and votes a mail-in ballot under section 1301-D shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place. 25 P.S. § 3150.16(b)(1). See also Election Code 1306(b)(1), 25 P.S. § 3146.6(b)(1).

90. Further, Act 77 provides that an elector who requests a mail-in or absentee ballot and who is not shown on the district register as having voted may vote only by provisional ballot at the polling place on Election Day, unless the elector remits the unvoted mail-in or absentee ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement under penalties of perjury that he or she has not voted the absentee or mail-in ballot. 25 P.S. §§ 3150.16(b)(2) & (3); 3146.6(b)(2) & (3).

91. These restrictions and requirements under Act 77 were put in place to reduce the possibility that illegally cast and/or fraudulent ballots would be counted.

92. On November 3, 2020, Pennsylvania conducted the General Election for national and statewide candidates, the first general election that followed enactment of Act 77 and its no-excuse, mail-in voting alternative.

93. However, Philadelphians “began in-person mail-in voting at the [S]atellite [O]ffices on September 29, 2020, sometime between 11:30 a.m. and 12:45 p.m.” *Donald. J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections*, 983 CD 2020, at 7 n. 3 (Pa. Commw. Ct. Oct. 23, 2020) (McCullough, J.) (dissenting).

94. “In fact, the presidential election is and has been happening since September 29, 2020. And, all across America, news reports in Philadelphia and elsewhere have clearly conveyed that multi-millions of electors have already voted.” *Id.* at p. 14-15.

95. Of the over 6.70 million votes cast for the Presidential election on November 3, 2020 in Pennsylvania, over 2.5 million votes were cast by mail-in or absentee ballot.

96. Despite the unprecedented number of votes cast by absentee and mail-in ballots, Defendants failed to take adequate measures to ensure that the provisions of the Election Code enacted to protect the validity of absentee or mail-in ballots, including without limitation Act 77, were followed. This is crucial because the casting of votes in violation of the Election Code’s

mandatory provisions renders them void. *Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234.

V. The Department of State’s “Guidance” Memos Published Ahead of the General Election.

A. August 19, 2020 Guidance On Inner Secrecy Envelopes.

97. On the same day its guidance on the use of unmanned drop boxes and other ballot-collection sites was disseminated, the Pennsylvania Department of State, with the knowledge, approval, and/or consent of Secretary Boockvar, published and disseminated to all the County Election Boards another guidance titled “*Pennsylvania Guidance for Missing Official Ballot Envelopes (‘Naked Ballots’)*.” A true and correct copy of the August 19, 2020 Naked Ballots guidance was available at the Pennsylvania Department of State’s web site at [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PAD OS _NakedBallot_Guidance_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PAD_OS_NakedBallot_Guidance_1.0.pdf).

98. In her Naked Ballot Guidance, Secretary Boockvar espoused “the ... position that naked ballots should be counted pursuant to the Pennsylvania Election Code, furthering the Right to Vote under the Pennsylvania and United States Constitutions[,]” that “[t]he failure to include the inner envelope (‘Secrecy Envelope’) does not undermine the integrity of the voting process[,]” and that “no voter should be disenfranchised for failing to place their ballot in the official election ballot envelope before returning it to the county board of

election.” *Id.* Upon information and belief, Secretary Bookvar – appointed by Democratic Governor Tom Wolfe – issued this “guidance” in order to encourage the counting of mail ballots which she knew would favor Biden.

99. On September 17, 2020, the Pennsylvania Supreme Court rejected the Secretary’s position and ruled that “the secrecy provision language in Election Code Section 3150.16(a) is mandatory and the mail-in elector’s failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.” *Pennsylvania Democratic Party*, 2020 Pa. LEXIS 4872 at *72.

100. Following the Pennsylvania Supreme Court’s September 17, 2020 decision, Secretary Boockvar has removed the August 19, 2020 Naked Ballot guidance from the Pennsylvania Department of State’s website. However, she has not issued any guidance advising all 67 County Election Boards that they must not count non-compliant absentee or mail-in ballots, including, without limitation, those that lack an inner secrecy envelope, contain on that envelope any text, mark, or symbol which reveals the elector’s identity, political affiliation, or candidate preference, do not include on the outside envelope a completed declaration that is dated and signed by the elector, and/or are delivered in-person by third-parties for non-disabled voters.

B. Guidance On Approving Absentee and Mail-In Ballot Applications and Canvassing Absentee and Mail-In Ballots.

101. On September 11, 2020, the Pennsylvania Department of State, with the knowledge, approval, and/or consent of Secretary Boockvar, published and disseminated to all the County Election Boards a guidance titled “GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES.” A true and correct copy of the September 11, 2020 Guidance is available at the Pennsylvania Department of State’s web site at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

102. Under the “Background” section of the September 11, 2020 Guidance, Secretary Boockvar states that “[b]efore sending [an absentee or mail-in] ballot to the applicant, the county board of elections confirms the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record[,]” that “[i]f the county is satisfied that the applicant is qualified, the application must be approved[,]” and that “[t]his approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter”

103. Yet, the Election Code mandates that for non-disabled and non-military voters, all applications for an absentee or mail-in ballot “shall be signed by the applicant.” 25 P.S. §§ 3146.2(d)& 3150.12(c). There is no signature requirement.

104. Moreover, because of the importance of the applicant’s signature and the use of the word “shall,” Pennsylvania courts have consistently upheld challenges to absentee ballots that have been cast by voters who did not sign their absentee ballot applications. See, e.g., *Opening of Ballot Box of the First Precinct of Bentleyville*, 598 A.2d 1341, 1343 (Pa. Commw. Ct. 1991).

105. Except for first-time voters, the only basis under the Election Code for the identification of any voter, whether voting in-person or by absentee or mail ballot, is by confirmation of the presence of the voter’s signature.

106. Before one can cast a regular ballot at a polling place on Election Day, that voter is subject to the following signature comparison and challenge process:

(1) All electors, including any elector that shows proof of identification pursuant to subsection (a), shall subsequently sign a voter’s certificate in blue, black or blue-black ink with a fountain pen or ball point pen, and, unless he is a State or Federal employee [sic] who has registered under any registration act without declaring his residence by street and number, he shall insert his address therein, and hand the same to the election officer in charge of the district register.

(2) Such election officer shall thereupon announce the elector’s name so that it may be heard by all members of the election

board and by all watchers present in the polling place and shall compare the elector's signature on his voter's certificate with his signature in the district register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote: Provided, That if the signature on the voter's certificate, as compared with the signature as recorded in the district register, shall not be deemed authentic by any of the election officers, such elector shall not be denied the right to vote for that reason, but shall be considered challenged as to identity and required to make the affidavit and produce the evidence as provided in subsection (d) of this section.

25 P.S. § 3050(a.3)(1) – (2)(2020) (emphasis added).

107. Similarly, under Election Code Section 1308(g)(3)-(7),

“[w]hen the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots . . . , the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File,’ whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’ verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be precanvassed [sic] or canvassed.” 25 P.S. § 3146.8(g)(3). Further, only those ballots “that have been verified under paragraph (3) shall be counted”

25 P.S. § 3146.8(g)(4).

108. If a ballot is not counted because of a lack of a signature, it is considered “challenged” and subject to the notice and hearing provisions under Section 1308(g)(5)-(7). 25 P.S. § 3146.8(g)(5)-(7).

109. The Pennsylvania Election Code authorizes the County Election Boards to set aside and challenge returned absentee or mail-in ballots that do not contain the signatures of voters and for which the County Election Boards did not verify the signature of the electors before the mail-in ballot was separated from the outer envelope.

110. Democratic controlled County Elections Board’s failure and refusal to set aside and challenge returned absentee or mail-in ballots that do not contain the signatures of voters in the November 3, 2020 General Election has resulted in the arbitrary, disparate, and unequal treatment between those who vote in-person at the polling place versus those who vote by absentee or mail-in ballot – all designed to favor Biden over Trump.

111. In addition, the disparate treatment between mail-in and in person voters as to the verification of the voter’s identity through signature verification has created an environment in Pennsylvania that encourages ballot fraud or tampering and prevents the Commonwealth and the County Election Boards from ensuring that the results of the November 3, 2020 General Election are free, fair, and transparent.

112. As a result of the manner in which the County Election Boards were directed to conduct the election including the canvassing of mail-in ballots, the validity of Pennsylvanians' votes who favor Trump have been unconstitutionally diluted through Defendants' arbitrary, disparate, and/or uneven approval of all absentee and mail-in ballots without performing the requisite verification of the voter's signature, resulting in the treatment of by-mail and in-person voters across the state in an unequal fashion in violation of state and federal constitutional standards in over to favor Biden.

113. The Department of State issued an additional deficient guidance related to the issue of signature verification on September 28, 2020 related to the issue of signature verification titled "GUIDANCE CONCERNING CIVILIAN ABSENTEE AND MAIL-IN BALLOT PROCEDURES." (App. Ex. 25.) This most recent guidance provides additional information about the acceptance and scrutiny of mail-in and absentee ballots for the General Election and not only fails to remedy but also doubles down on the illegal September 11 guidance forbidding signature verification as a reason to set aside both mail-in ballots and ballot applications. In the September 28 guidance memo, the Secretary proclaims that "[t]he Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis." (*Id.*, at p. 9.) She then goes even further and pronounces that "[n]o

challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” (Id.)

114. Secretary Boockvar continued to issue guidance to the counties in direct contradiction of the Election Code up until the eve of the election. On November 1, 2020, Secretary Boockvar, with no authority to do so, extended the Election Code’s mandatory deadline for voters to resolve proof of identification issues with their mail-in and absentee ballots.

VI. Defendants’ Inconsistent and Uneven Administration of the 2020 General Election Violated the Election Code and Infringed Plaintiffs’ Constitutional Rights to Free, Fair and Transparent Public Elections.

115. As of the filing of this complaint, 6,743,874 million votes were cast for President in Pennsylvania, with approximately 2,635,090 ballots returned and cast by absentee or mail-in ballots (approximately 3.1 million absentee and mail-in ballots were approved and sent to electors for the General Election). References contained herein to the November 3, 2020 election results in Pennsylvania are derived from <https://www.electionreturns.pa.gov/>.

116. In the named County Elections Boards, the following are the number of canvassed and tabulated absentee and mail-in ballots:

- a. Allegheny: 335,573
- b. Centre: 32,514
- c. Chester: 148,465

- d. Delaware: 127,751
- e. Montgomery: 238,122
- f. Northampton: 71,893
- g. Philadelphia: 345,197

117. Despite the fact that well over a third of the votes were cast by mail, Secretary Boockvar and the Pennsylvania Department of State did not undertake any meaningful effort to prevent casting illegal or unreliable absentee or mail-in ballots and/or to ensure the application of uniform standards across the County Election Boards to prevent the casting of such illegal or unreliable ballots. Rather, Secretary Boockvar has exercised every opportunity to do quite the opposite, thereby sacrificing the right to vote by those who legally cast their ballots (whether in-person or through properly cast absentee or mail-ballots) through the unlawful dilution or debasement of the weight of their vote in order to favor Biden over Trump.

A. The Prevalence of Unsolicited Mail-In Votes

118. Throughout the Commonwealth, including in the named County Election Boards, numerous voters reported receiving mail-in ballots, even though they did not apply for them.

119. Worse, numerous voters reported having received multiple mail-in ballots, in some documented cases as many as four or five ballots, even though they had not themselves submitted applications for mail-in ballots.

120. Moreover, at the polling locations on Election Day, voters were informed that they must vote provisionally because they had applied for mail-in votes, even though those voters report that they neither applied for nor received mail-in ballots. Poll watchers throughout the state who were permitted to observe reported similar incidents.

121. Voters reported being denied the right to vote in person because they had been told they had already voted by mail-in or absentee ballots, even though they appeared at their polling place with their un-voted mail-in or absentee ballots in hand. In many cases, those voters were required to vote provisionally in-person at the polls.

122. The Trump Campaign also have reports of voters who were visited at home in the weeks before the election by individuals soliciting their participation in mail-in voting. Those voters report that even though they never applied for mail-in ballots, they did receive mail in ballots, and when they attempted to vote in person were told that they had voted by mail. In at least two documented cases, even though poll workers told the voters that they were

recorded as having already voted by mail, they were allowed to vote in person by live ballot on the voting machines.

123. Other voters reported having received unsolicited and un-applied for mail-in ballots, but when they went to their in-person polling place, the poll books reflected that no mail-in ballot had been sent.

124. A voter (witness), who was required to vote provisionally because the voter was identified as having requested a mail-in ballot even though the voter had not done so, contacted the Allegheny County elections office to complain about having to submit a provisional ballot. The voter was told that a larger number of Republican voters experienced the same issue.

B. The Misadministration of the Election by the County Election Boards and Poll Workers.

125. In Montgomery County, a poll watcher observed a Judge of Elections pull aside voters who were not listed in the poll books as registered to vote. The poll watcher reports hearing the Judge of Elections tell those voters that they needed to return later and report their name as another name that was in the poll book.

126. Across numerous counties, poll watchers observed poll workers mishandling spoiled mail-in or absentee ballots brought to the polling place by voters who intended to vote in-person. Rather than disposing of the spoiled ballots securely, the spoiled ballots were instead placed in unsecured boxes or

in stacks of paper despite the protests of voters or poll watchers. For instance in Centre County, a poll worker observed mail-in ballots being improperly spoiled. The workers placed the mail-in ballots returned to the polling place by in-person voters in a bag without writing “void” on them or otherwise destroying them.

127. In at least one case, a voter brought the voter’s own secrecy envelope to the polling place after realizing that the voter had failed to include it when returning the mail-in ballot. The voter was not permitted to submit a provisional ballot in accordance with the statute.

128. In Allegheny County, poll workers were observing voters vote provisionally in such a way that the poll worker could determine which candidates the elector voted on their provisional ballot.

129. In Centre County, a poll worker reported that persons appearing at the polls and admitting that they were New Jersey voters, rather than Pennsylvania voters, were nonetheless provided provisional ballots on which to votes.

130. In Chester County, an observer witnessed a flawed resolution process for over-voted and under-voted ballots. The observer witnessed one election worker responsible for resolving over-voted and under-voted ballots by subjectively determining who the elector intended to choose on the empty votes. The observer reports that in numerous instances the election worker

altered the over-voted ballot by changing votes that had been marked for Donald J. Trump to another candidate.

131. In Delaware County, an observer at the county office observed issues related to mail-in voted ballots being scanned through machines four or five times before finally being counted. When a voting machine warehouse supervisor arrived to address whether the machine was malfunctioning, the supervisor instead reported that the bar codes on the ballots must be “defective.”

132. In Delaware County, poll watchers observed in at least seven (7) different polling locations numerous instances of voters who were told they had registered to vote by mail, but were given regular ballots, rather than provisional ballots, and were not made to sign in the registration book.

133. Mail carriers have noted significant anomalies related to the delivery of mail-in ballots. A mail carrier for the USPS in Erie County has noted that during the course of the General Election mail-in ballot delivery period there were multiple instances in which dozens of mail-in ballots were addressed to single addresses, each ballot being in a different name. Based on the carrier’s experience delivering mail to those addresses, the carrier is aware that the people whose names were on the ballots are not names of people who live at

those addresses. In addition, ballots were mailed to vacant homes, vacation homes, empty lots, and to addresses that do not exist.

134. It has been reported by Project Veritas, in a release on November 5, 2020, that carriers were told to collect, separate and deliver all mail-in ballots directly to the supervisor. In addition, Plaintiffs have information that the purpose of that process was for the supervisor to hand stamp the mail-in ballots.

C. Uneven Treatment of Absentee and Mail-Ballots Failed to Include a Secrecy Envelope or Otherwise Comply with the Mandates of the Election Code.

135. The statutory provisions in the Election Code and Act 77 involving absentee and mail-in ballots do not repose in either Secretary Boockvar or the County Election Boards the free-ranging power to attempt to ascertain voter intent or rule out fraud when a vote has been cast in violation of its explicit mandates. While voter intention may be paramount in the realm of the fundamental right to vote, ascertaining that intent necessarily assumes a properly cast ballot. Otherwise, a properly cast ballot will be diluted by one that has been improperly cast.

136. By enacting the inner secrecy envelope proscription and the other mandates for casting a “reliable vote” via an absentee or mail-in ballot, the General Assembly weighed the factors bearing on that question. It did not vest,

and has never vested, any discretion or rule-making authority in Secretary Boockvar and/or the County Election Boards to reweigh those factors in determining whether to count a particular absentee or mail-in ballot.

Pennsylvania Democratic Party, 2020 Pa. LEXIS 4872 at *73.

137. Pennsylvania prominently included secrecy envelope instructions in its mail-in ballot and absentee ballot mailings, and in the months and weeks leading up to the election, repeated those instructions on its website and on its social media postings. See, e.g., <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>

138. Local officials also conducted media campaigns to encourage voters to remember not to send their ballots in “naked,” i.e. without the secrecy envelope. The “naked ballot” ad campaign even included local celebrities and election officials appearing on social media to remind the public about the inner envelope.

139. Certain of the Democratic controlled County Election Boards proceeded to pre-canvass mail-in ballot envelopes prior to Election Day in order to favor Biden over Trump. For those ballots that lacked an inner secrecy envelope, the voters were notified prior to Election Day in order to “cure” the invalidity by voting provisionally on Election Day at their polling location.

140. As reflected in a document titled “Cancelled Ballot Notification Information,” Philadelphia County sent a “notification” to voters whose “ballot was cancelled” because, among other reasons, the ballot “was returned without a signature on the declaration envelope” or “was determined to lack a secrecy envelope.” Philadelphia County allowed those voters to cure this defect by casting a “provisional ballot on Election Day” or requesting “a replacement ballot at a satellite election office.” Philadelphia City Comm’rs, Cancelled Ballot Notification Information, bit.ly/3la08LR (last visited Nov. 7, 2020).

141. To figure out which voters should be notified, Philadelphia County had to inspect the mail-in ballots before election day—in plain violation of state law. See 25 P.S. §3146.8. This required substantial manipulation: Officials in Philadelphia County were determining whether ballots were missing an inner secrecy envelope, for example, which cannot be determined without manipulating the outer envelope—feeling the envelope, holding the envelope up to the light, weighing the envelope, by evaluating the weight of the envelope through the sorting and/or scanning equipment, etc. This kind of tampering squarely undermines the legislature’s “mandate” that mail-in voting cannot compromise “fraud prevention” or “ballot secrecy.” *Pa. Democratic Party*, 2020 Pa. LEXIS 4872, at *26.

142. Secretary Boockvar encouraged this unlawful behavior to favor Biden over Trump. In an November 2, 2020 email sent at approximately 8:30 p.m. on the eve of the November 3, 2020 General Election, her office suggested that counties “should provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected” so that those voters “may be issued a provisional ballot.”

143. While Democratic controlled counties like the Defendant County Boards of Elections permitted voters to cast either replacement absentee and mail-in ballots before Election Day or provisional ballots on Election Day in order to cure their defective mail-in ballots, many more Republican controlled counties did not. Lancaster, York, Westmoreland and Berks Counties, for example, did not contact voters who submitted defective ballots or give them an opportunity to cure. They simply followed the law and treated these ballots as invalid and refused to count them.

144. Because the counties that followed state law and did not provide a cure process are heavily Republican (and counties that violated state law and did provide a cure process are heavily Democratic), Defendants’ conduct harmed the Trump Campaign, as intended. It awarded Biden unlawful votes.

D. Uneven Treatment of Watchers and Representatives at the County Election Boards’ Canvassing of Ballots.

145. In every instance where an absentee or mail-in ballot is opened and canvassed by a county election board, poll watchers and canvass representatives are legally required to be present. See Election Code Section 1308(b), 25 P.S. § 3146.8(b) (“Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.”); see also 25 P.S. § 3146.8(g)(1.1) and (g)(2). (Emphasis added.)

146. Poll watchers and canvass representatives serve the important purpose of assuring voters, candidates, political parties, and political bodies, who may question the fairness of the election process, that the same is conducted in compliance with the law, and is done in a correct manner that protects the integrity and validity of the vote and ensures that all elections are free, open, fair, and honest.

147. Defendants refused to allow watchers and representatives to be present when the required declarations on envelopes containing official absentee and mail-in ballots were reviewed for sufficiency, when the ballot envelopes were opened, and when such ballots were counted and recorded. Instead, watchers were denied access by security personnel and a metal barricade from the area where the review, opening, and counting were taking place. Some of the Trump campaign watchers were threatened with arrest if

they approached the counting process area. Consequently, it was physically impossible to view the envelopes or ballots.

148. In Centre County, the central pre-canvassing location was a large ballroom. The set-up was such that the poll watchers did not have meaningful access to observe the canvassing and tabulation process of mail-in and absentee ballots, and in fact, the poll watchers and observers who were present could not actually observe the ballots to be able to confirm or object to the validity of the ballots.

149. In Philadelphia County, poll watchers and canvass representatives were denied access altogether.

150. In Delaware County, observers were denied access to a back room counting area. After a court-ordered injunction, the poll watchers and canvass representatives were allowed in the back room counting area on November 5, 2020, but for only five minutes every two hours. During the limited observation time in the counting area, observers witnessed tens of thousands of paper ballots but they could only review a handful.

151. Other Republican controlled Pennsylvania Counties, such as York, provided watchers with appropriate access to view the ballots as required by Commonwealth law. However, Defendants in Democratic-controlled counties intentionally denied the Trump Campaign access to unobstructed observation to

ensure validity of the ballots, denying Plaintiffs and Pennsylvania residents the equal protection of the law.

152. In Philadelphia County, the Board of Elections would not permit any Trump Campaign watcher to be within 6 feet of “all aspects” of the pre-canvassing process in direct contravention of Commonwealth Court Judge Christine Fizzano Cannon’s November 5, 2020 Order “requiring that all candidates, watchers, or candidate representatives be permitted to be present for the canvassing process pursuant to 25 P.S. § 2650 and/or 25 P.S. § 3146.8 and be permitted to observe all aspects of the canvassing process within 6 feet.” See *In Re: Canvassing Observation, 11/05/2020 Order*, 1094 C.D. 2020 (Pa. Commw. Ct. 2020).

153. The Order required the Philadelphia Board of Elections to comply and allow the watcher to be within 6 feet by 10:30 a.m., but at 10:35 a.m. the watchers were denied entry. Instead, the Board sent all the workers on a break (previously workers received breaks on a rolling basis), while the Commissioners met offsite. Two hours later the workers returned, and the watchers were allowed to be within 6 feet, but within 6 feet of the first row of counters only. Within a short period of time, the workers began working at other rows that were well-beyond 6-feet, rendering it impossible for watchers to observe the rows that were more than 25-feet beyond the area where watchers

were allowed. Moreover, during the entire period, the workers repeatedly removed ballots, sometimes over 100 feet away, to do something with them, which the Trump Campaign's watchers were unable to observe.

154. Other Republican controlled Counties in the Commonwealth afford watchers the right to be present – that is, to be able to meaningfully view and even read – when official absentee and mail-in ballots are reviewed, being opened, counted, or recorded as required by 25 P.S. § 3146.8(b).

155. It is estimated that 680,770 ballots were processed by the Allegheny and Philadelphia County Boards of Elections when no observation was allowed.

156. Defendants have violated the Equal Protection Clause because as a result of their conduct to obscure access to the vote-counting process, watchers in Allegheny, Philadelphia and other Defendant Counties did not have the same right as watchers in Republican controlled Pennsylvania Counties, such as York, to be present when envelopes containing official absentee and mail-in ballots were reviewed, opened, counted, and recorded. Also, this violation of law and United States Constitution means voters are at an unequal risk of having their legal votes diluted by ballots that otherwise should have been disqualified. There is no legitimate state interest justifying this disparity; rather, it was done to favor Biden over Trump.

E. Mail-in Ballots Received After 8 p.m. On Election Day

157. A shocking number of mail-in ballots have inexplicably appeared in counties after the November 4 ballot reports. For instance, in Delaware County, the county's Wednesday, November 4 report indicated that Delaware County reported it has received about 113,000 mail-in ballots and counted approximately 93,000 voted ballots. On the next day, November 5, the Secretary of the Commonwealth's 4:30 report reflected that Delaware County had received about 114,000 ballots. Several hours later, the Delaware County solicitor reported to an observer that the County had received about 126,000 mail-in ballots and counted about 122,000. As of Sunday, November 8, 2020, the Department of State's website reflects that Delaware County had counted about 127,000 mail-in ballots. Plaintiffs have received no explanation for where the additional 14,000 voted ballots came from, when they arrived, or why they are included in the current count.

158. In Delaware County, an observer in the county office where mail-in ballots were counted was told by the Delaware County Solicitor that ballots received on November 4, 2020, were not separated from ballots received on Election Day, and the County refused to answer any additional questions. The refusal to segregate ballots violates the order of Supreme Court Justice Alito of November 6th, 2020 that all ballots...be segregated and kept 'in a secure, safe

and sealed container separate from other voted ballots,’ “ See Justice Alito’s Order, *Republican Party of Pennsylvania v Kathy Boockvar, Secretary of Pennsylvania, et al.* 20A66 U.S. (Nov. 6, 2020).

159. Also in Delaware County, an observer in the county office where mail-in ballots were counted witnessed delivery on November 5, 2020, of v-cards or USB drives in a plastic bag with no seal and no accompanying paper ballots. The vcards or USB drives were taken to the back counting room, with no observer access. There was no opportunity to observe what happened to the v-cards or USB drives in the back counting room.

VII. Need for Emergency Judicial Intervention.

160. The Equal Protection Clause mandates that the Commonwealth provide and use in every County the same statewide uniform standards and regulations when conducting statewide or multi-county elections involving federal candidates, including without limitation the standards and regulations providing for casting and counting votes. *Pierce*, 324 F. Supp. 2d at 698-99. In other words, the Equal Protection Clause requires every county in the Commonwealth to enforce and apply the same standards and procedures for an election. It does not allow a select few counties to decline to enforce or employ those standards or to develop their own contradicting standards that benefit their voters, and their political candidates, to the detriment of voters in counties that

predominately support another candidate. *Id.* In this case, Defendants' conduct was designed to favor Biden over Trump.

161. For statewide elections involving federal candidates, Defendants' allowance, by deliberate act or omission, of collecting and counting in-person, provisional, and absentee and mail-in ballots in a manner and at locations that are contrary to the Election Code's mandatory provisions (as set forth above) constitutes legislative action by the Executive Branch in violation of the Elections and Electors Clauses of the United States Constitution.

162. Finally, Defendants' lack of statewide standards and use of a patchwork of ad-hoc rules that vary from county to county in a statewide election involving federal and state-wide candidates violates the Equal Protection clause of the Fourteenth Amendment, particularly when it was designed to favor Biden over Trump. *Pierce*, 324 F. Supp. 2d at 698-99.

163. Because standards for conducting statewide elections involving federal and state candidates, including without limitation casting and counting votes, are to be uniform, Plaintiffs have a vested interest in ensuring that the electoral process is properly administered in every election district. However, the administration of the November 3, 2020 General Election across the counties of the Commonwealth, in particular in the named County Election Boards, was far from uniform and violated the Election Code and the United

States Constitution, particularly because it was designed to favor Biden over Trump.

164. In light of Defendants' clear violations of United States Constitution through their illegal implementation of Pennsylvania's Election Code, as set forth above, Plaintiffs seek an order, declaration and/or injunction directing the Defendants to verify and confirm that all mail-in ballots tabulated in the 2020 election results in the Commonwealth of Pennsylvania were validly cast in compliance with state law and disallow those ballots which did not comply.

165. The current voting regime as employed by Defendants has resulted in the denial of free and fair elections and other fundamental rights during the 2020 Pennsylvania General Election.

COUNT I

Fourteenth Amendment

U.S. Const. Art. I § 4, cl. 1; Art. II, § 1, cl. 2; Amend. XIV, 42 U.S.C. § 1983

Right to Vote Due Process is Denied When the State Violates the Legislative Procedure Enacted to Prevent Disenfranchisement

166. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

167. Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination to favor presidential candidate Joseph Biden over Donald J. Trump by excluding Republican and Trump Campaign observers from the canvassing of the mail

ballots in order to conceal their decision not to enforce requirements that the declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes as required by 15 PA.S 3146.6(a) and 3150.16(a) in order to count absentee and mail ballots which should have been disqualified.

168. Defendant County Election Boards carried out this scheme knowing that the absentee and mail ballots which should have been disqualified would overwhelmingly favor Biden because of the registrations of the persons who voted by mail, as well as because of their knowledge and participation in the Democrat/Biden election strategy, which favored mail voting, compared to the Republican/Trump strategy, which favored voting in person at the polls. As a result, Defendant County Election Boards deliberately favored Biden with votes that should not have been counted, effectively stuffing the ballot box in his favor with illegal votes in violation of *Reynolds*, *Bush v. Gore*, *Snowden v. Hughes*, 321 U.S. 1 (1943), and *Marks v. Stinson*. Upon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have been counted, and the vast majority favored Biden, thus resulting in returns indicating Biden won Pennsylvania.

169. The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth

Amendment of the United States Constitution. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 665 (1966). See also *Reynolds*, 377 U.S. at 554 (The Fourteenth Amendment protects the “the right of all qualified citizens to vote, in state as well as in federal elections.”). Indeed, ever since *Slaughter-House Cases*, 83 U.S. 36 (1873), the United States Supreme Court has held that the Privileges or Immunities Clause of the Fourteenth Amendment protects certain rights of federal citizenship from state interference, including the right of citizens to directly elect members of Congress. See *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651, 663-64 (1884)). See also *Oregon v. Mitchell*, 400 U.S. 112, 148-49 (1970) (Douglas, J., concurring) (collecting cases).

170. The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it “is preservative of other basic civil and political rights.” *Reynolds*, 377 U.S. at 562.

171. Voters have a “right to cast a ballot in an election free from the taint of intimidation and fraud,” *Burson v. Freeman*, 504 U.S. 191, 211 (1992), and “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

172. “Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted” if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). “[T]he right to have the vote counted” means counted “at full value without dilution or discount.” *Reynolds*, 377 U.S. at 555, n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

173. “Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.” *Anderson v. United States*, 417 U.S. 211, 227 (1974); see also *Baker v. Carr*, 369 U.S. 186, 208 (1962).

174. Invalid or fraudulent votes “debase[]” and “dilute” the weight of each validly cast vote. See *Anderson*, 417 U.S. at 227.

175. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.” *Anderson*, 417 U.S. at 226 (quoting *Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff’d* due to absence of quorum, 339 U.S. 974 (1950)).

176. Practices that promote casting illegal or unreliable ballots, or that fail to contain basic minimum guarantees against such conduct, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. See *Reynolds*, 377 U.S. at 555 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

177. The Fourteenth Amendment Due Process Clause protects the right to vote from conduct by state officials that seriously undermines the fundamental fairness of the electoral process. *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994); *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978).

178. Separate from the Equal Protection Clause, the Fourteenth Amendment’s due process clause protects the fundamental right to vote against “the disenfranchisement of a state electorate.” *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981).

179. “When an election process ‘reaches the point of patent and fundamental unfairness,’ there is a due process violation.” *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008) (quoting *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir.1995) (citing *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir.1986))). See also *Griffin*, 570 F.2d at 1077 (“If the election process itself reaches the point of patent and fundamental

unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order.”); *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) (enjoining winning state senate candidate from exercising official authority where absentee ballots were obtained and cast illegally).

180. Justification for such a ruling is the Supreme Court’s recognition that the right to vote and to free and fair elections is one that is preservative of other basic civil and political rights. See *Black*, 209 F.Supp.2d at 900 (quoting *Reynolds*, 377 U.S. at 561-62 (“since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”)); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“the political franchise of voting ... is regarded as a fundamental political right, because [sic] preservative of all rights.”).

181. “[T]he right to vote, the right to have one’s vote counted, and the right to have ones vote given equal weight are basic and fundamental constitutional rights incorporated in the due process clause of the Fourteenth Amendment to the Constitution of the United States.” *Black*, 209 F. Supp. 2d at 900 (a state law that allows local election officials to impose different voting schemes upon some portions of the electorate and not others violates due process).

182. “Just as the equal protection clause of the Fourteenth Amendment prohibits state officials from improperly diluting the right to vote, the due process clause of the Fourteenth amendment forbids state officials from unlawfully eliminating that fundamental right.” *Duncan*, 657 F.2d at 704.

183. “Having once granted the right to vote on equal terms, [Defendants] may not, by later arbitrary and disparate treatment, value one person's vote over that of another.” *Bush*, 531 U.S. at 104-05.

184. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the November 3, 2020 General Election, all candidates, political parties, and voters, including without limitation Plaintiffs, have a vested interest in being present and having meaningful access to observe and monitor the electoral process to ensure that it is properly administered in every election district and otherwise free, fair, and transparent.

185. Moreover, through its provisions involving watchers and representatives, the Pennsylvania Election Code ensures that all candidates and political parties, including without limitation Plaintiff, the Trump Campaign, shall be “present” and have meaningful access to observe and monitor the electoral process to ensure that it is properly administered in every election district and otherwise free, fair, and transparent.

186. Defendants have a duty to guard against deprivation of the right to vote through the dilution of validly cast ballots by ballot fraud or election tampering.

187. Rather than heeding these mandates and duties, Defendants arbitrarily and capriciously denied the Trump Campaign meaningful access to observe and monitor the electoral process by: (a) mandating that representatives at the prec canvass and canvass of all absentee and mail-ballots be either Pennsylvania barred attorneys or qualified registered electors of the county in which they sought to observe and monitor; and (b) not allowing watchers and representatives to visibly see and review all envelopes containing official absentee and mail-in ballots either at the time or before they were opened and/or when such ballots were counted and recorded.

188. Instead, Defendants refused to credential all of the Trump Campaign's submitted watchers and representatives and/or kept Trump Campaign's watchers and representatives by security and metal barricades from the areas where the inspection, opening, and counting of absentee and mail-in ballots were taking place. Consequently, Defendants created a system whereby it was physically impossible for the candidates and political parties to view the ballots and verify that illegally cast ballots were not opened and counted.

189. Defendants intentionally and/or arbitrarily and capriciously denied the Trump campaign access to and/or obstructed actual observation and monitoring of the absentee and mail-in ballots being pre-canvassed and canvassed by Defendants. The individual Plaintiffs were treated differently than voters in Defendant Counties, where upon information and belief, voters were permitted to cure. Because the individual Plaintiffs believe the “right to cure” is illegal under Pennsylvania law, the appropriate remedy is to exclude the votes of those persons who were illegally allowed to cure.

190. Defendants have acted and will continue to act under color of state law to violate the right to vote and due process as secured by the Fourteenth Amendment to the United States Constitution.

191. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT II
Fourteenth Amendment
U.S. Const. Amend. XIV, 42 U.S.C. § 1983
U.S. Const. Art. I § 4, cl. 1; Art. II, § 1, cl. 2; Amend. XIV, 42 U.S.C. §
1983
Right to Vote Equal Protection is Denied When the State Violates the
Legislative Procedure Enacted to Protect the Integrity of the Voting
Process, including Counting Ballots Designed to Favor Biden Over
Trump

192. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

193. The Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination to favor Biden over Trump by excluding Republican and Trump Campaign observers from canvassing mail-in ballots in order to conceal their decision not to enforce requirements that the declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes as required by 15 PA.S 3146.6(a) and 3150.16(a) in order to count absentee and mail ballots which should have been disqualified.

194. Defendant County Election Boards carried out this scheme knowing that the absentee and mail ballots which should have been disqualified would overwhelmingly favor Biden because of the registrations of the persons who voted by mail, as well as their knowledge and participation in the Democrat/Biden election strategy, which favored mail voting, compared to the Republican/Trump strategy, which favored voting in person at the polls. As a result, Defendant County Election Boards deliberately favored Biden with votes that should not have been counted, effectively stuffing the ballot box in his favor with illegal votes in violation of *Reynolds*, *Bush v. Gore*, *Snowden v. Hughes*, 321 U.S. 1 (1943), and *Marks v. Stinson*. Upon information and belief, a substantial portion of the approximately 1.5 million absentee and mail

votes in Defendant Counties should not have been counted. The vast majority favored Biden, thus resulting in returns indicating Biden won Pennsylvania.

195. Where Democrat-controlled counties barred the Campaign's poll watchers from performing their statutorily authorized duties to the Campaign, Republican controlled counties, like York, Lancaster and Adams counties allowed all poll watchers- Republican and Democrat alike to observe the voting process without obstruction.

196. In York County, for example, an attorney for the York County Republican Party who served as Legal Counsel to the Party and as a duly credentialed poll watcher, and supervised non-attorney poll watchers in York County on Election Day, November 3, 2020 personally observed all aspects of the voting process including in-person voting, the opening of mail-in ballots, and the opening of provisional ballots. This attorney stated that he observed no deficiencies or impediments to the open and transparent observation of the election process, while at the same time Pennsylvania poll waters in the City of Philadelphia experienced the exact opposite while trying to exercise the privilege of poll watching.

197. Likewise, in York County, Jared M. Mellott, a licensed attorney and dually credentialed poll watcher personally observed the process of mail-in ballots being opened and scanned by the York County Office of Elections on

election day. Since election day, he has supervised other poll watchers and observed the opening and review of provisional ballots in York County. In all these times, Mr. Mellott neither saw nor was aware of any deficiencies or impediments to the open and transparent observation of the processing of ballots.

198. The statutorily valid and constitutionally approved process in York County , when compared to democrat -run counties where such required procedures, safe guards, and other constitutionally required validation did not occur creates a very clear case of a 14th Amendment violation of the Equal Protection clause. *Bush*, 531 U.S. at 104-05.

199. It is patently clear that citizens of Pennsylvania were treated differently depending on their county of residency in violation of the Equal Protection Clause of the Constitution of the United States. Poll watchers experienced disparate treatment in the discharge of the duties county to county as did voters who cast a “naked ballot.”

200. Equal enforcement of election laws is necessary to preserve our most basic and fundamental rights.

201. Equal protection is stringently enforced where laws affect the exercise of fundamental rights, including the right to vote.

202. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the November 3, 2020 General Election, all candidates, political parties, and voters, including without limitation Plaintiffs, have a vested interest in being present and having meaningful access to observe and monitor the electoral process in each County to ensure that it is properly administered in every election district and otherwise free, fair, and transparent.

203. Moreover, through its provisions involving watchers and representatives, the Pennsylvania Election Code ensures all candidates and political parties in each county, including the Trump Campaign, have meaningful access to observe and monitor the electoral process to ensure it is properly administered in every election district and otherwise free, fair, and transparent. See, e.g., 25 P.S. §§ 3146.8(b) & (g)(1.1)-(2).

204. Defendants have a duty to treat voting citizens in each County in the same manner as the citizens in other counties in Pennsylvania.

205. Rather than heeding these mandates and duties, Defendants denied the Trump Campaign equal rights to meaningful access to observe and monitor the electoral process enjoyed by citizens in other Pennsylvania counties by: (a) mandating that representatives at the pre-canvass and canvass of all absentee and mail-ballots be either Pennsylvania barred attorneys or qualified registered

electors of the county in which they sought to observe and monitor; and (b) not allowing watchers and representatives to visibly see and review all envelopes containing official absentee and mail-in ballots either at or before they were opened and/or when such ballots were counted and recorded. Instead, Defendants refused to credential the Trump Campaign's submitted watchers and representatives and/or kept Trump Campaign's watchers and representatives by security and metal barricades from the areas where meaningful inspection, opening, and counting of absentee and mail-in ballots were taking place. Consequently, Defendants created a system, contrary to state law, whereby it was physically impossible for the candidates and political parties to view the ballots and verify that illegally cast ballots were not opened and counted in order to favor Biden over Trump.

206. Philadelphia County Boards of Elections in Republican controlled counties, such as York County, provided watchers and representatives of candidates and political parties, including without limitation watchers and representatives of both the Trump Campaign and the Biden Campaign, with appropriate access to view absentee and mail-in ballots being pre-canvassed and canvassed by those Boards and without restricting representatives by any county residency or Pennsylvania bar licensure requirements.

207. Pennsylvania County Board of Electors in Democratic controlled counties, such as Philadelphia County, prevented Trump campaign watchers from observing the vote processing and counting.

208. Defendants intentionally and/or arbitrarily and capriciously denied Plaintiffs access to and/or obstructed actual observation and monitoring of the absentee and mail-in ballots being pre-canvassed and canvassed by Defendants, depriving them of the equal protection of those state laws enjoyed by citizens in other Counties.

209. Defendants have acted and will continue to act under color of state law to violate Plaintiffs' right to be present and have actual observation and access to the electoral process as secured by the Equal Protection Clause of the United States Constitution.

210. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT III
U.S. Const. Art. I, §4, cl. 1 & Art. II, § 1, cl. 2
Violation of the Electors & Elections Clauses
Denial of Observers

211. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

212. The Electors Clause states that “[e]ach State shall appoint, in such Manner as *the Legislature* thereof may direct, a Number of Electors” for

President. U.S. Const. art. II, § 1, cl. 2 (emphasis added). Likewise, the Elections Clause of the U.S. Constitution states that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” U.S. Const. art. I, § 4, cl. 1 (emphasis added).

213. The Legislature is “the representative body which ma[kes] the laws of the people.” *Smiley*, 285 U.S. at 365.

214. Regulations of congressional and presidential elections, thus, “must be in accordance with the method which the state has prescribed for legislative enactments.” *Id.* at 367; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668 (2015).

215. In Pennsylvania, “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representative.” Pa. Const. Art. II, § 1. See also *Winston*, 91 A. at 522; *Patterson*, 60 Pa. at 75.

216. Defendants, as a member of the Governor’s Executive Board and county boards of elections, are not part of the General Assembly and cannot exercise legislative power. Rather, Defendants’ power is limited to “tak[ing] care that the laws be faithfully executed.” Pa. Const. Art. IV, § 2.

217. Because the United States Constitution reserves for the General Assembly the power to set the time, place, and manner of holding elections for the President and Congress, county boards of elections and state executive officers have no authority to unilaterally exercise that power, much less to hold them in ways that conflict with existing legislation.

218. Through its provisions involving watchers and representatives, the Pennsylvania Election Code ensures that all candidates and political parties, including without limitation Plaintiff, the Trump Campaign, shall be “present” and have meaningful access to observe and monitor the electoral process to ensure that it is properly administered in every election district and otherwise free, fair, and transparent. See, e.g., 25 P.S. §§ 3146.8(b) & (g)(1.1)-(2).

219. Defendants are not the legislature, and their unilateral decisions to implement, and/or override rules and procedures that deny Plaintiffs the ability to be “present” and have meaningful access to observe and monitor the electoral process violates the Electors and Elections Clauses of the United States Constitution.

220. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT IV
Fourteenth Amendment
U.S. Const. Amend. XIV, 42 U.S.C. § 1983
Denial of Equal Protection
Disparate Treatment of Absentee/Mail-In Voters Among Different
Counties Designed to Favor Biden Over Trump

221. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

222. Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination to favor presidential candidate Biden over by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce requirements that the declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes as required by 15 PA.S 3146.6(a) and 3150.16(a) in order to count absentee and mail ballots which should have been disqualified.

223. The Defendant County Election Boards carried out this scheme knowing that the absentee and mail ballots which should have been disqualified would overwhelmingly favor Biden because of the registrations of the persons who voted by mail, as well as their knowledge and participation in the Democrat/Biden election strategy, which favored mail voting, compared to the Republican/Trump strategy, which favored voting in person at the polls. As a result, the Defendant County Election Boards deliberately favored Biden with

votes that should not have been counted, effectively stuffing the ballot box in his favor with illegal votes in violation of *Reynolds*, *Bush v. Gore*, *Snowden v. Hughes*, 321 U.S. 1 (1943), and *Marks v. Stinson*. Upon information and belief, a substantial portion of the approximately 1.5 million absentee and mail-in votes in Defendant Counties should not have been counted. The vast majority favored Biden, thus resulting in returns indicating Biden won Pennsylvania.

224. George Andrew Gallenthin has been resident of Pennsylvania for 28 years. On November 3, 2020, Mr. Gallenthin was designated as a “credentialed” observer of vote counting and verification. On November 4, 2020, Mr. Gallenthin arrived at the Philadelphia Convention Center to observe city employees count absentee and mail-in ballots. However, he was barred by city officials from entering the area where the vote counting was taking place. Mr. Gallenthin waited in the lobby area at the Convention Center from 10:00 am to 4:00 pm but was never allowed to observe the vote counting and verification area. Mr. Gallenthin also served as an official observer for the 2020 Trump campaign in Bucks County Pennsylvania from 10:00 pm November 3 through 7:00 am November 4. He was able to observe, without issue, the ballot processing in Bucks County, as were Biden campaign watchers.

225. Where Democrat-controlled counties barred the Trump Campaign’s poll watchers from performing their statutorily authorized duties to the

Campaign, Republican controlled counties, like York, Lancaster and Adams counties allowed all poll watchers- Republican and Democrat alike to observe the voting process without obstruction.

226. In York County, for example, an attorney for the York County Republican Party who served as Legal Counsel to the Party and as a duly credentialed poll watcher who supervised non-attorney poll watchers in York County on Election Day, November 3, 2020 personally observed, all aspects of the voting process including in-person voting, the opening of mail-in ballots, and the opening of provisional ballots. This attorney has indicated that he observed no deficiencies or impediments to the open and transparent observation of the election process, while at the same time Pennsylvania poll waters in the City of Philadelphia experienced the exact opposite while trying to exercise the privilege of poll watching.

227. Likewise, in York County, Jared M. Mellott, a licensed attorney and dually credentialed poll watcher personally observed the process of mail-in ballots being opened and scanned by the York County Office of Elections on election day. Since election day, he supervised other poll watchers and observed the opening and review of provisional ballots in York County. In all these times, Mr. Mellott neither saw nor was aware of any deficiencies or

impediments to the open and transparent observation by persons qualified to watch the processing of ballots.

228. The statutorily valid and constitutionally approved process in York County, when compared to Democrat-run counties where such required procedures, safe guards, and other constitutionally required validation did not occur, creates a clear case of a 14th Amendment violation of the Equal Protection clause. *Bush*, 531 U.S. at 104-05.

229. It is patently clear that citizens of Pennsylvania were treated differently county to county in violation of the Equal Protection Clause of the Constitution of the United States. Poll watchers experienced disparate treatment in the discharge of the duties county to county as did voters who cast a “naked ballot.”

230. The Fourteenth Amendment of the United States Constitution protects the “the right of all qualified citizens to vote ... in federal elections.” *Reynolds*, 77 U.S. at 554. Consequently, state election laws may not “deny to any person within” the state’s “jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, §1, cl. 4.

231. The Equal Protection Clause requires States to ““avoid arbitrary and disparate treatment of the members of its electorate.”” *Charfauros v. Bd. of Elections*, 249 F.3d 941, 951 (9th Cir. 2001) (quoting *Bush*, 531 U.S. at 105).

That is, each citizen “has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Bloomstein*, 405 U.S. 330, 336 (1972). A qualified voter “is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution’s Equal Protection Clause.” *Reynolds*, 377 U.S. at 568; see also *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (“The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court’s] decisions.”). “[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush*, 531 U.S. at 104-05.

232. “The right to vote extends to all phases of the voting process, from being permitted to place one’s vote in the ballot box to having that vote actually counted. Thus, the right to vote applies equally to the ‘initial allocation of the franchise’ as well as ‘the manner of its exercise.’ Once the right to vote is granted, a state may not draw distinctions between voters that are inconsistent with the guarantees of the Fourteenth Amendment’s equal protection clause.” *Pierce*, 324 F. Supp. 2d at 695.

233. “[T]reating voters differently” thus “violate[s] the Equal Protection Clause” when the disparate treatment is the result of arbitrary, ad hoc processes.

Charfauros, 249 F.3d at 954. Indeed, a “minimum requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote].” *Bush*, 531 U.S. at 105.

234. The use of “standardless” procedures can violate the Equal Protection Clause. *Bush*, 531 U.S. at 103. “The problem inheres in the absence of specific standards to ensure ... equal application” of even otherwise unobjectionable principles. *Id.* at 106. Any voting system that involves discretion by decision makers about how or where voters will vote must be “confined by specific rules designed to ensure uniform treatment.” *Id.* See also *Thomas v. Independence Twp.*, 463 F.3d 285, 297 (3d Cir. 2006) (Equal Protection Clause prohibits the “selective enforcement” of a law based on an unjustifiable standard); *United States v. Batchelder*, 442 U.S. 114, 125 n.9, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).

235. Allowing a patchwork of different rules from county to county, and as between similarly situated absentee and mail-in voters, in a statewide election involving federal and state candidates implicates equal protection concerns. *Pierce*, 324 F. Supp. 2d at 698-99. See also *Gray*, 372 U.S. at 379-81 (a county unit system which weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties

violates the Equal Protection Clause and its one-person, one-vote jurisprudence).

236. Equal enforcement of election laws is necessary to preserve our most basic and fundamental rights. Moreover, the requirement of equal treatment is particularly stringently enforced as to laws that affect the exercise of fundamental rights, see *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), including the right to vote.

237. Because of Defendants’ conduct, voters in some counties have been and being treated differently than voters in other counties—and for no good reason. A voter in any of the counties covered by Defendant County Elections Boards, who received notice of a defective mail-in ballot and an opportunity to cure it by correcting the ballot or casting a new one before Election Day or by casting a provisional ballot at the polling place on Election Day, has had or may have his vote counted. But voters like Plaintiff Henry, who received no such opportunity, will not, as their votes were rejected as having been improperly cast and thus void. The appropriate remedy is to exclude the votes of those who received an unauthorized opportunity to cure.

238. That “different standards have been employed in different counties across the Commonwealth of Pennsylvania to determine whether an absentee ballot should be counted” is the “kind of disparate treatment” that violates “the

equal protection clause because uniform standards will not be used statewide to discern the legality of a vote in a statewide election.” *Pierce*, 324 F. Supp. 2d at 699.

239. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT V
U.S. Const. Art. I, §4, & Art. II, § 1
Violation of the Electors & Elections Clauses
Unauthorized Notice and Cure

240. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

241. The Electors Clause states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” for President. Art. II, § 1, cl. 2 (emphasis added). Likewise, the Elections Clause of the U.S. Constitution states that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” Art. I, § 4, cl. 1 (emphasis added).

242. The Legislature is “the representative body which ma[kes] the laws of the people.” *Smiley*, 285 U.S. at 1932.

243. Regulations of congressional and presidential elections, thus, “must be in accordance with the method which the state has prescribed for legislative

enactments.” *Id.* at 367; see also *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668 (2015).

244. An unverified ballot is an unverified vote. Unverified votes make for unverified election results. Unverified election results undermine faith in democracy itself.

245. In Pennsylvania, “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representative.” Pa. Const. Art. II, § 1. See also *Winston*, 91 A. at 522; *Patterson*, 60 Pa. at 75.

246. Defendants, as a member of the Governor’s Executive Board and county boards of elections, are not part of the General Assembly and cannot exercise legislative power. Rather, Defendants’ power is limited to “tak[ing] care that the laws be faithfully executed.” Pa. Const. Art. IV, § 2.

247. Because the United States Constitution reserves for the General Assembly the power to set the time, place, and manner of holding elections for the President and Congress, county boards of elections and state executive officers have no authority to unilaterally exercise that power, much less to hold them in ways that conflict with existing legislation.

248. According to the Pennsylvania Supreme Court, “although the Election Code provides the procedures for casting and counting a vote by mail, it does

not provide for the ‘notice and opportunity to cure’ procedure[.]” *Pa.*

Democratic Party, 2020 Pa. LEXIS 4872, at *56. Moreover, “[t]o the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, ... the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature[,] . . . particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government.” *Id.*

249. Defendants are not the legislature, and their unilateral decision to create a cure procedure violates the Electors and Elections Clauses of the United States Constitution.

250. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT VI
Fourteenth Amendment Equal Protection Clause
U.S. Const. Amend. XIV, 42 U.S.C. § 1983
Denial of Due Process
Disparate Treatment of Absentee/Mail-In Voters Among Different
Counties Designed to Favor Biden Over Trump

251. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

252. Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination to favor presidential candidate Biden over Trump by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce requirements that declarations on the outside envelopes are properly filled out, signed, and dated and had secrecy envelopes as required by 15 PA.S 3146.6(a) and 3150.16(a) in order to count absentee and mail ballots which should have been disqualified.

253. The Defendant County Election Boards carried out this scheme knowing that the absentee and mail ballots that should have been disqualified would overwhelmingly favor Biden because of the registrations of persons who voted by mail, as well as their knowledge and participation in the Democrat/Biden election strategy, which favored mail-in voting, compared to the Republican/Trump strategy, which favored voting in person at the polls. As a result, Defendant County Election Boards deliberately favored Biden with votes which should not have been counted, effectively stuffing the ballot box in his favor with illegal votes in violation of *Reynolds*, *Bush v. Gore*, *Snowden v. Hughes*, 321 U.S. 1 (1943), and *Marks v. Stinson*. Upon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in the Defendant Counties should not have been counted, and the vast

majority favored Biden, thus resulting in returns indicating Biden won Pennsylvania.

254. George Andrew Gallenthin has been a resident of Pennsylvania for 28 years. On November 3, 2020, Mr. Gallenthin was designated as a “credentialed” observer of vote counting and verification. On November 4, 2020, Mr. Gallenthin arrived at the Philadelphia Convention Center to observe city employees count absentee and mail-in ballots. However, he was barred by city officials from entering the area where the vote counting was taking place. Mr. Gallenthin waited in the lobby area at the Convention Center from 10:00 am to 4:00 pm but was never allowed to observe the vote counting and verification area. Mr. Gallenthin also served as an official observer for the 2020 Trump campaign in Bucks County Pennsylvania from 10:00 pm November 3 through 7:00 am November 4. He was able to observe, without issue, the ballot processing in Bucks County.

255. Voting is a fundamental right protected by the Fourteenth Amendment to the United States Constitution.

256. The Fourteenth Amendment protects the right to vote from conduct by state officials which seriously undermines the fundamental fairness of the electoral process. *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994); *Griffin*, 570 F.2d at 1077-78. “[H]aving once granted the right to vote on equal terms,

the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104-05.

257. The United States Constitution entrusts state legislatures to set the time, place, and manner of congressional elections and to determine how the state chooses electors for the presidency. See U.S. Const. Art. I, § 4, cl. 1 & Art. II, § 1, cl. 2.

258. In Pennsylvania, "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representative." Pa. Const. Art. II, § 1. See also *Winston*, 91 A. at 522; *Patterson*, 60 Pa. at 75.

259. Defendants, as a member of the Governor's Executive Board and county executive agencies, are not part of the General Assembly and cannot exercise legislative power. Rather, Defendants' power is limited to "tak[ing] care that the laws be faithfully executed." Pa. Const. Art. IV, § 2.

260. Although the Pennsylvania General Assembly may enact laws governing the conduct of elections, "no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions." *Shankey*, 257 A. 2d at 898.

261. According to the Pennsylvania Supreme Court, "although the Election Code provides the procedures for casting and counting a vote by mail, it does

not provide for the ‘notice and opportunity to cure’ procedure[.]” *Pa.*

Democratic Party, 2020 Pa. LEXIS 4872, at *56. Moreover, “[t]o the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, ... the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature[,]. . . particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government.” *Id.*

262. Defendants are not the legislature, and their unilateral decision to create and implement a cure procedure for some but not all absentee and mail-in voters in this Commonwealth violates the Due Process Clause of the United States Constitution.

263. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT VII
Fourteenth Amendment
U.S. Const. Art. I § 4, cl. 1; Art. II, § 1, cl. 2; Amend. XIV, 42 U.S.C. §
1983
Due Process is Denied When the Voting Protections Are Denied

264. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

265. This cause of action concerns observation of the Philadelphia County Board of Elections pre-canvassing and canvassing of mail-in and absentee ballots at the Philadelphia Convention Center.

266. The Philadelphia County Board of Elections erected a waist-high fence that blocked access to observe any closer than 15-18 feet.

267. The Philadelphia County Board of Elections' setup had some tables in the area over one hundred feet away from the edge of the waist-high fence.

268. The Pennsylvania Election Code prohibits the security envelope from containing any "text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference." 25 P.S. § 3146.8(g)(4)(ii).

269. Plaintiff sent a designated representative, Attorney Jeremy Mercer, to observe the pre-canvassing and canvassing process.

270. Attorney Mercer testified that while he could see the Philadelphia County Board of Elections' employees examining the back of the ballot-return

envelopes, he could not read the actual declarations on the ballot envelopes and could not see whether there were any “text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference” on the security envelopes.

271. Attorney Mercer testified that he could not see individual markings on the secrecy envelopes or determine whether the signature on all the ballot envelopes was properly completed.

272. The Pennsylvania Election Code provides for the watchers to be “present” and “to remain in the room.” 25 P.S. § 2650; 25 P.S. § 3146.8(b) and (g); 25 P.S. § 3146.8(g)(2).

273. These provisions of the Pennsylvania Election Code have as their purpose “maintaining the integrity of the elective process in the Commonwealth.”

274. Unverified election results undermine faith in the integrity of the elections and indeed of democracy itself. Unverified votes make for unverified election results. An unverified ballot is an unverified vote.

275. Pennsylvania Commonwealth Judge Christine Fizzano Cannon found that, “based on Attorney Mercer’s testimony that, when he was physically present in the room where the pre-canvassing and canvassing processes were occurring, the distance from which he was observing those processes, as well as

the physical barriers in the room, prevented him from observing the ballots being processed, the ballot envelopes, the secrecy envelopes, and any markings on the secrecy envelopes, depriving him of the ability to actually observe those processes “in any meaningful way”. Single-Judge Order of the Honorable Christine Fizzano Cannon of the Commonwealth Court at No. 1094 CD 2020 (November 5, 2020).

276. These provisions for watchers to be present should be broadly interpreted consistent with their overall purpose of allowing public observation of the vote and the counting thereof.

277. The plain meaning and purpose of the statutes at issue is to provide the public the opportunity to observe and vet the canvassing and tabulation of the vote.

278. To allow observation without the ability to see is akin to allow listening without the ability to hear.

279. A violation of Due Process results when the methods legislatively provided for observing and “maintaining the integrity of the elective process” are abridged and truncated

280. Based on the Pennsylvania Supreme Court opinion that declared observers merely present, Plaintiffs are additionally harmed by further

depravation of their Due Process rights under the Constitution. Plaintiffs' franchise was denied by direct, improper, and unconstitutional acts.

281. Based on the Pennsylvania Supreme Court opinion which held that observation need not be meaningful, the holding thus permits votes to be counted by counties who followed the meaningful observation argument and by counties refusing watchers. Pennsylvania counties followed the law, logic, and tradition of employing observers to not only be present but to ensure the elements of the election code were being strictly followed. This disparate treatment between Pennsylvania counties created a textbook example of Equal protection violation, prohibited by the Unites States Supreme Court (*Bush v. Gore*).

282. Pennsylvania's executive and judicial branches, by creating a new legal definition and standard for election observers and their role in ensuring transparency and accountability, have departed from the overwhelmingly majority opinion among democracies. All states but Pennsylvania recognize the role of observers in this process, and Pennsylvania has created and Equal Protection violation among other U.S. states. Plaintiffs have been harmed by the dilution of their vote in their county, their Commonwealth, their nation.

283. With the Pennsylvania Supreme Court ruling (*In re: Canvassing Operation Appeal of: City of Philadelphia Board of Elections*, PA Supreme

Court, no. 30EAP 2020) (November 17, 2020), Plaintiffs have exhausted state court remedies regarding observers, have no adequate remedy at law, and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT XIII
Fourteenth Amendment Equal Protection Clause
U.S. Const. Amend. XIV, 42 U.S.C. § 1983
Equal Protection is Denied When the Voting Protections Are Denied

284. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

285. This cause of action concerns observation of the Philadelphia County Board of Elections pre-canvassing and canvassing of mail-in and absentee ballots at the Philadelphia Convention Center.

286. The Philadelphia County Board of Elections erected a waist-high fence that blocked access to observe any closer than 15-18 feet.

287. The Philadelphia County Board of Elections' setup had some tables in the area over one hundred feet away from the edge of the waist-high fence.

288. The Pennsylvania Election Code prohibits the security envelope from containing any "text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference." 25 P.S. § 3146.8(g)(4)(ii).

289. Plaintiff sent a designated representative, Attorney Jeremy Mercer, to observe the pre-canvassing and canvassing process.

290. Attorney Mercer testified that while he could see the Philadelphia County Board of Elections' employees examining the back of the ballot-return envelopes, he could not read the actual declarations on the ballot envelopes and could not see whether there were any "text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference" on the security envelopes.

291. Attorney Mercer testified that he could not see individual markings on the secrecy envelopes or determine whether the signature on all the ballot envelopes was properly completed.

292. The Pennsylvania Election Code provides for the watchers to be "present" and "to remain in the room." 25 P.S. § 2650; 25 P.S. § 3146.8(b) and (g); 25 P.S. § 3146.8(g)(2).

293. These provisions of the Pennsylvania Election Code have as their purpose "maintaining the integrity of the elective process in the Commonwealth."

294. Unverified election results undermine faith in the integrity of the elections and indeed of democracy itself. Unverified votes make for unverified election results. An unverified ballot is an unverified vote.

295. Pennsylvania Commonwealth Judge Christine Fizzano Cannon found that, “based on Attorney Mercer’s testimony that, while he was physically present in the room where the pre-canvassing and canvassing processes were occurring, the distance from which he was observing those processes, as well as the physical barriers in the room, prevented him from observing the ballots being processed, the ballot envelopes, the secrecy envelopes, and any markings on the secrecy envelopes, depriving him of the ability to actually observe those processes ‘in any meaningful way’.” Single-Judge Order of the Honorable Christine Fizzano Cannon of the Commonwealth Court at No. 1094 CD 2020 (November 5, 2020).

296. These provisions for watchers to be present should be broadly interpreted consistent with their overall purpose of allowing public observation of the vote and the counting thereof.

297. The plain meaning and purpose of the statutes at issue is to provide the public the opportunity to observe and vet the canvassing and tabulation of the vote.

298. To allow observation without the ability to see is akin to allow listening without the ability to hear.

299. A violation of Due Process results when the methods legislatively provided for observing and “maintaining the integrity of the elective process” are abridged and truncated

300. Based on the Pennsylvania Supreme Court opinion that declared observers merely be present, but not be provided meaningful review, Plaintiffs are additionally harmed by further deprivation of their Due Process rights under the Constitution. Plaintiffs’ franchise was denied by direct, improper, and unconstitutional acts.

301. Based on the Pennsylvania Supreme Court opinion that declared observers merely present, which is a patently inconsistent opinion by the Pennsylvania Supreme Court as many Pennsylvania counties followed the law, logic, and tradition of employing observers to not only be present but to ensure the elements of the election code were being strictly followed. This disparate treatment between Pennsylvania counties created a textbook example of Equal protection violation, prohibited by the Unites States Supreme Court (*Bush v. Gore*).

302. Pennsylvania’s executive and judicial branches, by creating a new legal definition and standard for election observers and their role in ensuring transparency and accountability, have departed from the overwhelmingly majority opinion among democracies. All states but Pennsylvania recognize the

role of observers in this process, and Pennsylvania has created an Equal Protection violation among other U.S. states. Plaintiffs have been harmed by the dilution of their vote in their county, their Commonwealth, their nation.

303. With the Pennsylvania Supreme Court ruling (*In re: Canvassing Operation Appeal of: City of Philadelphia Board of Elections*, PA Supreme Court, no. 30EAP 2020) (November 17, 2020), Plaintiffs have exhausted state court remedies regarding observers, have no adequate remedy at law, and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

COUNT IX
U.S. Const. Art. I, §4, & Art. II, § 1
Violation of the Electors & Elections Clauses When the Voting Protections
Are Denied

304. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

305. This cause of action concerns observation of the Philadelphia County Board of Elections pre-canvassing and canvassing of mail-in and absentee ballots at the Philadelphia Convention Center.

306. The Philadelphia County Board of Elections erected a waist-high fence that blocked access to observe any closer than 15-18 feet.

307. The Philadelphia County Board of Elections' setup had some tables in the area over one hundred feet away from the edge of the waist-high fence.

308. The Pennsylvania Election Code prohibits the security envelope from containing any “text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference.” 25 P.S. § 3146.8(g)(4)(ii).

309. Plaintiff sent a designated representative, Attorney Jeremy Mercer, to observe the pre-canvassing and canvassing process.

310. Attorney Mercer testified that while he could see the Philadelphia County Board of Elections’ employees examining the back of the ballot-return envelopes, he could not read the actual declarations on the ballot envelopes and could not see whether there were any “text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference” on the security envelopes.

311. Attorney Mercer testified that he could not see individual markings on the secrecy envelopes or determine whether the signature on all the ballot envelopes was properly completed.

312. The Pennsylvania Election Code provides for the watchers to be “present” and “to remain in the room.” 25 P.S. § 2650; 25 P.S. § 3146.8(b) and (g); 25 P.S. § 3146.8(g)(2).

313. These provisions of the Pennsylvania Election Code have as their purpose “maintaining the integrity of the elective process in the Commonwealth.”

314. Unverified election results undermine faith in the integrity of the elections and indeed of democracy itself. Unverified votes make for unverified election results. An unverified ballot is an unverified vote.

315. Pennsylvania Commonwealth Judge Christine Fizzano Cannon found that, “based on Attorney Mercer’s testimony that, while he was physically present in the room where the pre-canvassing and canvassing processes were occurring, the distance from which he was observing those processes, as well as the physical barriers in the room, prevented him from observing the ballots being processed, the ballot envelopes, the secrecy envelopes, and any markings on the secrecy envelopes, depriving him of the ability to actually observe those processes ‘in any meaningful way’.” Single-Judge Order of the Honorable Christine Fizzano Cannon of the Commonwealth Court at No. 1094 CD 2020 (November 5, 2020).

316. These provisions for watchers to be present should be broadly interpreted consistent with their overall purpose of allowing public observation of the vote and the counting thereof.

317. The plain meaning and purpose of the statutes at issue is to provide the public the opportunity to observe and vet the canvassing and tabulation of the vote.

318. To allow observation without the ability to see is akin to allow listening without the ability to hear.

319. A violation of Due Process results when the methods legislatively provided for observing and “maintaining the integrity of the elective process” are abridged and truncated

320. Based on the Pennsylvania Supreme Court opinion that declared observers be merely present but not given meaningful review, Plaintiffs are additionally harmed by further deprivation of their Due Process rights under the Constitution. Plaintiffs’ franchise was denied by direct, improper, and unconstitutional acts.

321. The Pennsylvania Supreme Court opinion that declared that the law only requires that observers be present, is a patently inconsistent opinion by the Pennsylvania Supreme Court, as many Pennsylvania counties followed the law, logic, and tradition of employing observers to not only be present but to ensure the elements of the election code were being strictly followed. this disparate treatment between Pennsylvania counties created a textbook example of an

Equal Protection violation, prohibited by the United States Supreme Court (*Bush v. Gore*).

322. Pennsylvania's executive and judicial branches, by creating a new legal definition and standard for election observers and their role in ensuring transparency and accountability, have departed from the overwhelmingly majority opinion among democracies. The majority of U.S. states recognize the role of observers in this process, and Pennsylvania has created an Equal Protection violation among other U.S. states. Plaintiffs have been harmed by the dilution of their vote in their county, their Commonwealth, their nation.

323. With the Pennsylvania Supreme Court ruling (*In re: Canvassing Operation Appeal of: City of Philadelphia Board of Elections*, PA Supreme Court, no. 30EAP 2020) (November 17, 2020), Plaintiffs have exhausted state court remedies regarding observers, have no adequate remedy at law, and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

PRAYER FOR RELIEF

324. **WHEREFORE**, in addition to any other affirmative relief that the Court may deem necessary and proper, Plaintiffs ask this Court to enter judgment in their favor and provide the following alternative relief:

325. That, as a result of Defendants' violations of the United States Constitution and violations of other federal and state election laws, this Court should enter an order, declaration, and/or injunction that prohibits Defendants from certifying the results of the 2020 presidential general election in Pennsylvania on a statewide basis;

326. Ultimately, that, as a result of Defendants' violations of the United States Constitution and violations of other federal and state election laws, this Court should enter an order, declaration, and/or injunction prohibiting Defendants from certifying the results of the General Elections which include the tabulation of unauthorized votes, including mail ballots which did not meet the statutory requirements, mail ballots which were cured without authorization, and any other vote cast in violation of law, and, instead, compel Defendants to certify the results of the election based solely on the legal votes.

327. Alternatively, that, as a result of Defendants' violations of the United States Constitution and violations of other federal and state election laws, this Court should enter an order, declaration, and/or injunction that the results of the 2020 presidential general election are defective and providing for the Pennsylvania General Assembly to choose Pennsylvania's electors.

328. A temporary restraining order and preliminary injunction granting the above relief during the pendency of this action;

329. Plaintiffs' reasonable costs and expenses of this action, including attorneys' fees; and cost; and

330. Any and other such further relief that this Court deems equitable and just or to which Plaintiffs might be entitled.

Respectfully submitted,

/s/ Rudolph William Giuliani
Rudolph William Giuliani
NY Supreme Court ID No. 1080498

/s/Marc A. Scaringi
Marc A. Scaringi
marc@scaringilaw.com
PA Supreme Court ID No. 88346

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2000 Linglestown Road, Suite 106
Harrisburg, PA 17110
717-657-7770 (o)/ 717-657-7797 (f)

Date: November 19, 2020

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that I have reviewed the foregoing Complaint and that the factual allegations are true and correct.

Date: November 18, 2020

/s/ James Fitzpatrick
James Fitzpatrick, PA EDO Director
Donald J. Trump for President, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR	:	
PRESIDENT, INC., et al,	:	CIVIL ACTION
	:	
Plaintiffs	:	No. 4:20-cv-02078
	:	
v.	:	Judge Brann
	:	
KATHY BOOCKVAR, et al,	:	
	:	
Defendants	:	

CERTIFICATE OF SERVICE

I, Deborah A. Black, Paralegal for Scaringi Law, do hereby certify that I served a true and correct copy of ***Plaintiffs' Second Verified Complaint for Declaratory and Injunctive Relief***, in the above-captioned action, upon all parties via CM/ECF.

Date: November 19, 2020

/s/ Deborah A. Black
Deborah A. Black, Paralegal
For Marc A. Scaringi, Esquire and
Brian C. Caffrey, Esquire

Exhibit 11

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR
PRESIDENT, INC., *et al.*,

Plaintiffs,

v.

KATHY BOOCKVAR, *et al.*,

Defendants.

No. 4:20-CV-02078

(Judge Brann)

MEMORANDUM OPINION

NOVEMBER 21, 2020

Pending before this Court are various motions to dismiss Plaintiffs’ First Amended Complaint. Plaintiffs in this matter are Donald J. Trump for President, Inc. (the “Trump Campaign”), and two voters, John Henry and Lawrence Roberts (the “Individual Plaintiffs”).¹ Defendants, who filed these motions to dismiss, include seven Pennsylvania counties (the “Defendant Counties”), as well as Secretary of the Commonwealth Kathy Boockvar.²

I. INTRODUCTION

In this action, the Trump Campaign and the Individual Plaintiffs (collectively, the “Plaintiffs”) seek to discard millions of votes legally cast by Pennsylvanians from all corners – from Greene County to Pike County, and

¹ Doc. 125.

² *Id.* Since the filing of the initial complaint, there have also been several intervenors and amicus petitioners.

everywhere in between. In other words, Plaintiffs ask this Court to disenfranchise almost seven million voters. This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated. One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens.

That has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more. At bottom, Plaintiffs have failed to meet their burden to state a claim upon which relief may be granted. Therefore, I grant Defendants' motions and dismiss Plaintiffs' action with prejudice.

II. BACKGROUND

A. Legal and Factual Background

The power to regulate and administer federal elections arises from the Constitution.³ “Because any state authority to regulate election to those offices

³ *Cook v. Gralike*, 531 U.S. 510, 522 (2001).

could not precede their very creation by the Constitution, such power ‘had to be delegated to, rather than reserved to by, the States.’”⁴ Consequently, the Elections Clause “delegated to the States the power to regulate the ‘Times, Places, and Manner of holding Elections for Senators and Representatives,’ subject to a grant of authority to Congress to ‘make or alter such Regulations.’”⁵ Accordingly, States’ power to “regulate the incidents of such elections, including balloting” is limited to “the exclusive delegation of power under the Elections Clause.”⁶

Pennsylvania regulates the “times, places, and manner” of its elections through the Pennsylvania Election Code.⁷ The Commonwealth’s Constitution mandates that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”⁸ Recognizing this as a foundational principle, the Pennsylvania Supreme Court has declared that the purpose of the Election Code is to promote “freedom of choice, a fair election and an honest election return.”⁹

In October 2019, the General Assembly of Pennsylvania enacted Act 77, which, “for the first time in Pennsylvania,” extended the opportunity for all

⁴ *Id.* (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804 (1995)).

⁵ *Id.* (quoting U.S. Const. Art. I, § 4, cl. 1).

⁶ *Id.* at 523.

⁷ 25 P.S. §§ 2601, *et seq.*

⁸ *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (quoting Pa. Const., Art. I, § 5).

⁹ *Id.* (quoting *Perles v. Hoffman*, 213 A.2d 781, 783 (Pa. 1965)).

registered voters to vote by mail.¹⁰ Following the beginning of the COVID-19 outbreak in March 2020, the General Assembly enacted laws regulating the mail-in voting system.¹¹ Section 3150.16 of the Election Code sets forth procedural requirements that voters must follow in order for their ballot to be counted.¹² These procedures require, for example, that voters mark their ballots in pen or pencil, place them in secrecy envelopes, and that ballots be received by the county elections board on or before 8:00 P.M. on Election Day.¹³

Nowhere in the Election Code is any reference to “curing” ballots, or the related practice of “notice-and-cure.” This practice involves notifying mail-in voters who submitted procedurally defective mail-in ballots of these deficiencies and allowing those voters to cure their ballots.¹⁴ Notified voters can cure their ballots and have their vote counted by requesting and submitting a provisional ballot.¹⁵

Recently, the Supreme Court of Pennsylvania in *Democratic Party of Pennsylvania v. Boockvar* addressed whether counties are *required* to adopt a notice-and-cure policy under the Election Code.¹⁶ Holding that they are not, the

¹⁰ *Id.* at 352 (citing 25 P.S. §§ 3150.11-3150.17). Prior to the enactment of Act 77, voters were only permitted to vote by mail if they could “demonstrate their absence from the voting district on Election Day.” *Id.* (internal citations omitted).

¹¹ *E.g.*, 25 P.S. § 3150.16.

¹² *Id.*

¹³ *Id.*

¹⁴ *Pa. Democratic Party*, 238 A.3d at 372.

¹⁵ Doc. 93 at 9.

¹⁶ *Pa. Democratic Party*, 238 A.3d at 374.

court declined to explicitly answer whether such a policy is necessarily *forbidden*.¹⁷

Following this decision, Secretary Boockvar sent an email on November 2, 2020 encouraging counties to “provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected” so those ballots could be cured.¹⁸ From the face of the complaint, it is unclear which counties were sent this email, which counties received this email, or which counties ultimately followed Secretary Boockvar’s guidance.

Some counties chose to implement a notice-and-cure procedure while others did not.¹⁹ Importantly, however, Plaintiffs allege only that Philadelphia County implemented such a policy.²⁰ In contrast, Plaintiffs also claim that Lancaster and York Counties (as well as others) did not adopt any cure procedures and thus rejected all ballots cast with procedural deficiencies instead of issuing these voters provisional ballots.²¹

Both Individual Plaintiffs had their ballots cancelled in the 2020 Presidential Election.²² John Henry submitted his mail-in ballot to Lancaster County; however, it was cancelled on November 6, 2020 because he failed to place his ballot in the

¹⁷ *Id.* (holding only that the Election Code “does not provide for the ‘notice and opportunity to cure’ procedure sought by Petitioner”).

¹⁸ Doc. 125 at ¶ 129.

¹⁹ *Id.* at ¶¶ 124-27.

²⁰ *Id.* at ¶ 127.

²¹ *Id.* at ¶ 130.

²² *Id.* at ¶¶ 15-16.

required secrecy envelope.²³ Similarly, after submitting his ballot to Fayette County, Lawrence Roberts discovered on November 9, 2020 that his ballot had been cancelled for an unknown reason.²⁴ Neither was given an opportunity to cure his ballot.²⁵

B. The 2020 Election Results

In large part due to the coronavirus pandemic still plaguing our nation, the rate of mail-in voting in 2020 was expected to increase dramatically. As anticipated, millions more voted by mail this year than in past elections. For weeks before Election Day, ballots were cast and collected. Then, on November 3, 2020, millions more across Pennsylvania and the country descended upon their local voting precincts and cast ballots for their preferred candidates. When the votes were counted, the Democratic Party's candidate for President, Joseph R. Biden Jr., and his running-mate, Kamala D. Harris, were determined to have received more votes than the incumbent ticket, President Donald J. Trump and Vice President Michael R. Pence. As of the day of this Memorandum Opinion, the Biden/Harris ticket had received 3,454,444 votes, and the Trump/Pence ticket had received 3,373,488 votes, giving the Biden ticket a lead of more than 80,000 votes, per the Pennsylvania state elections return website.²⁶ These results will become

²³ *Id.* at ¶ 15.

²⁴ *Id.* at ¶ 16.

²⁵ *Id.* at ¶¶ 15-16.

²⁶ Pa. Dep't of State, *Unofficial Returns, Statewide*, <https://www.electionreturns.pa.gov/> (last visited on November 21, 2020).

official when counties certify their results to Secretary Boockvar on November 23, 2020 – the result Plaintiffs seek to enjoin with this lawsuit.

C. Procedural History

Although this case was initiated less than two weeks ago, it has already developed its own tortured procedural history. Plaintiffs have made multiple attempts at amending the pleadings, and have had attorneys both appear and withdraw in a matter of seventy-two hours. There have been at least two perceived discovery disputes, one oral argument, and a rude and ill-conceived voicemail which distracted the Court’s attention from the significant issues at hand.²⁷ The Court finds it helpful to place events in context before proceeding further.

In the evening of November 9, 2020, Plaintiffs filed suit in this Court against Secretary Boockvar, as well as the County Boards of Elections for the following counties: Allegheny, Centre, Chester, Delaware, Montgomery, Northampton, and Philadelphia.²⁸ The original complaint raised seven counts; two equal-protection claims, two due-process claims, and three claims under the Electors and Elections Clauses.²⁹

The following day, I convened a telephonic status conference with the parties to schedule future proceedings. During that conference, I learned that several organizations, including the Democratic National Committee, sought to file

²⁷ Doc. 131 (denied).

²⁸ See Doc. 1.

²⁹ *Id.*

intervention motions with the Court. Later that day, I set a briefing schedule.³⁰

Additionally, November 17, 2020 was set aside for oral argument on any motions to dismiss, and the Court further told the parties to reserve November 19, 2020 in their calendars in the event that the Court determined that an evidentiary hearing was necessary. Subsequent to the Court's scheduling order, the proposed-intervenors filed their motions, and the parties filed their briefings. Plaintiffs then filed a motion for a preliminary injunction on November 12, 2020.³¹

On November 12, 2020, Plaintiffs also underwent their first change in counsel. Attorneys Ronald L. Hicks, Jr., and Carolyn B. McGee with Porter Wright Morris & Arthur LLP filed a motion seeking to withdraw from the case. The Court granted this motion, and Plaintiffs retained two attorneys from Texas, John Scott and Douglas Brian Hughes, to serve as co-counsel to their original attorney, Linda A. Kerns.

The next day, November 13, 2020, was a relatively quiet day on the docket for this case, but an important one for the parties. That day, the United States Court of Appeals for the Third Circuit issued a decision in *Bognet v. Secretary Commonwealth of Pennsylvania*.³² This decision, though not factually connected

³⁰ See Doc. 35.

³¹ Doc. 89.

³² No. 20-3214, 2020 WL 6686120 (3d Cir. Nov. 13, 2020) (pending publication).

to this matter, addressed issues of standing and equal protection relevant to the Plaintiffs' claims.³³

Thereafter, on Sunday, November 15, 2020 – the day Plaintiffs' response to Defendants' motions to dismiss was due – Plaintiffs filed a First Amended Complaint (the "FAC") with the Court. This new complaint excised five of the seven counts from the original complaint, leaving just two claims: one equal-protection claim, and one Electors and Elections Clauses claim.³⁴ In addition, a review of the redline attached to the FAC shows that Plaintiffs deleted numerous allegations that were pled in the original complaint.

Plaintiffs acknowledge that under the Third Circuit's decision in *Bognet*, this Court cannot find that Plaintiffs have standing for their Elections and Electors Clauses claim in the FAC. Plaintiffs represent that they have included this claim in the FAC to preserve the argument for appellate review. Because Plaintiffs have made this concession, and because the Third Circuit's decision in *Bognet* is clear, this Court dismisses Count II for lack of standing without further discussion.

Defendants filed new motions to dismiss and briefs in support thereof on November 16, 2020. That evening, less than 24 hours before oral argument was to begin, Plaintiffs instituted a second series of substitutions in counsel. Ms. Kerns,

³³ For example, *Bognet* held that only the General Assembly had standing to raise claims under the Elections and Electors Clauses. *Id.* at *7. This ruling effectively shut the door on Plaintiffs' allegations under those clauses of the Constitution.

³⁴ Doc. 125.

along with Mr. Scott and Mr. Hughes, requested this Court's permission to withdraw from the litigation. I granted the motions of the Texan attorneys because they had been involved with the case for approximately seventy-two hours. Because oral argument was scheduled for the following day, however, and because Ms. Kerns had been one of the original attorneys in this litigation, I denied her request. I believed it best to have some semblance of consistency in counsel ahead of the oral argument. That evening, attorney Marc A. Scaringi entered an appearance on behalf of Plaintiffs. Furthermore, Mr. Scaringi asked the Court to postpone the previously-scheduled oral argument and evidentiary hearing. The Court denied Mr. Scaringi's motion for a continuance; given the emergency nature of this proceeding, and the looming deadline for Pennsylvania counties to certify their election results, postponing those proceedings seemed imprudent.

On November 17, 2020, the Court prepared to address the parties in oral argument. That morning, attorney Rudolph W. Giuliani entered his appearance on behalf of Plaintiffs. With this last-minute appearance, Plaintiffs had made their final addition to their representation.³⁵ At the conclusion of the argument, I determined that an evidentiary hearing (previously scheduled to take place on November 19, 2020) was no longer needed and cancelled that proceeding. Instead, I imposed a new briefing schedule in light of the FAC's filing, which arguably

³⁵ Ms. Kerns has since withdrawn from the case.

mooted the initial motions to dismiss. The parties submitted briefing on the issues.³⁶

D. Plaintiffs' Claims

Plaintiffs' only remaining claim alleges a violation of equal protection. This claim, like *Frankenstein's Monster*, has been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent. The general thrust of this claim is that it is unconstitutional for Pennsylvania to give states discretion to adopt a notice-and-cure policy. Invoking *Bush v. Gore*, Plaintiffs assert that such local control is unconstitutional because it creates an arbitrary system where some persons are allowed to cure procedurally defective mail-in ballots while others are not.

Apparently recognizing that such a broad claim is foreclosed under the Third Circuit's decision in *Bognet*, Plaintiffs try to merge it with a much simpler theory of harm based on the cancellation of Individual Plaintiffs' ballots in order to satisfy standing.³⁷ Because Individual Plaintiffs' votes were invalidated as procedurally

³⁶ Separately, Plaintiffs filed a motion seeking leave to file a second amended complaint. Doc. 172. Having filed the FAC as of right, Plaintiffs may file a second amended complaint only with the opposing party's written consent or the court's leave. During the oral argument on November 17, 2020, Defendants indicated that they would not consent to the filing of a third pleading and did not concur in the motion for leave to file this second amended complaint.

³⁷ Plaintiffs initially appeared to base their standing under the Equal Protection Clause on the theory that the notice-and-cure policy unlawfully allowed certain ballots to be counted, and that this inclusion of illegal ballots diluted Plaintiffs' legal votes. Doc. 1. After *Bognet* expressly rejected this theory of standing, however, Plaintiffs have since reversed course and now argue that their standing is based on the cancellation of Individual Plaintiffs' votes and the Trump Campaign's "competitive standing." 2020 WL 6686120, at *9-10; Doc. 124 at 2.

defective, Individual Plaintiffs argue, for purposes of standing, that their claim is based on the denial of their votes. But on the merits, Plaintiffs appear to have abandoned this theory of harm and instead raise their broader argument that the lack of a uniform prohibition against notice-and-cure is unconstitutional.³⁸ They assert this theory on behalf of both Individual Plaintiffs and the Trump Campaign.

That Plaintiffs are trying to mix-and-match claims to bypass contrary precedent is not lost on the Court. The Court will thus analyze Plaintiffs' claims as if they had been raised properly and asserted as one whole for purposes of standing *and* the merits. Accordingly, the Court considers Plaintiffs as alleging two equal-protection claims. The first being on behalf of Individual Plaintiffs whose ballots were cancelled. And the second being on behalf of the Trump Campaign and raising the broad *Bush v. Gore* arguments that Plaintiffs allege is the main focus of this lawsuit.³⁹ The Court analyzes both claims separately for purposes of standing and the merits analysis.

III. STANDING

Plaintiffs lack standing to raise either of their claims. "Article III of the United States Constitution limits the power of the federal judiciary to 'cases' and

To the extent that Plaintiffs may still argue that votes have been unconstitutionally diluted (*see*, FAC ¶ 97), those claims are barred by the Third Circuit's decision in *Bognet*.

³⁸ Plaintiffs essentially conceded that they were only setting forth the vote-denial theory for purposes of standing when they stated on the record at oral argument that they believed Individual Plaintiffs' votes were *lawfully* cancelled. Hr'g. Tr. 110:22-111:02.

³⁹ In briefing, Plaintiffs attempt to revive their previously-dismissed poll-watcher claims. Count I does not seek relief for those allegations, but the Court considers them, *infra*.

‘controversies.’”⁴⁰ To satisfy the case-or-controversy requirement, a plaintiff must establish that they have standing.⁴¹ Standing is a “threshold” issue.⁴² It is an “irreducible constitutional minimum,” without which a federal court lacks jurisdiction to rule on the merits of an action.⁴³ Consequently, federal courts are obligated to raise the issue of standing sua sponte.⁴⁴

The plaintiff bears the burden of establishing standing.⁴⁵ To demonstrate standing, he must show: (1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.⁴⁶ “In assessing whether a plaintiff has carried this burden, [courts must] separate [the] standing inquiry from any assessment of the merits of the plaintiff’s claim.”⁴⁷ “To maintain this fundamental separation between standing and merits at the dismissal stage, [courts] assume for the purposes of [the] standing inquiry that a plaintiff has stated valid legal claims.”⁴⁸ “While [the Court’s] standing inquiry may necessarily reference the ‘nature and

⁴⁰ *Pa. Voters All. v. Centre Cnty.*, No. 4:20-CV-01761, 2020 WL 6158309, at *3 (M.D. Pa. Oct. 21, 2020) (quoting *Cottrell v. Alcon Laboratories*, 874 F.3d 154, 161-62 (3d Cir. 2017)).

⁴¹ *Cottrell*, 874 F.3d at 161-62.

⁴² *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm’n*, 959 F.3d 569, 573-74 (3d Cir. 2020) (internal citations omitted).

⁴³ *Id.* at 574 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

⁴⁴ *Id.* (quoting *Seneca Reservation Corp. v. Twp. of Highland*, 863 F.3d 245, 252 (3d Cir. 2017)).

⁴⁵ *Cottrell*, 874 F.3d at 162 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

⁴⁶ *Id.* (quoting *Spokeo*, 136 S. Ct. at 1547).

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *Info. Handling Servs., Inc. v. Defense Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003)).

source of the claims asserted,’ [the Court’s] focus remains on whether the plaintiff is the proper party to bring those claims.”⁴⁹

As discussed above, Plaintiffs allege two possible theories of standing. First, Individual Plaintiffs argue that their votes have been unconstitutionally denied. Under this theory, Individual Plaintiffs must show that Defendant Counties’ use of the notice-and-cure procedure, as well as Secretary Boockvar’s authorization of this procedure, denied Individual Plaintiffs the right to vote.⁵⁰ Second, the Trump Campaign maintains that it has competitive standing.⁵¹

Both theories are unavailing. Assuming, as this Court must, that Plaintiffs state a valid equal-protection claim, the Court finds that Individual Plaintiffs have adequately established an injury-in-fact. However, they fail to establish that it was Defendants who caused these injuries and that their purported injury of vote-denial is adequately redressed by invalidating the votes of others. The Trump Campaign’s theory also fails because neither competitive nor associational standing applies, and it does not assert another cognizable theory of standing.

⁴⁹ *Id.* (brackets and internal citations omitted).

⁵⁰ As discussed above, to the extent that Plaintiffs would have premised standing on the theory that Pennsylvania’s purportedly unconstitutional failure to uniformly prohibit the notice-and-cure procedure constitutes vote-dilution, such an assertion would be foreclosed under *Bognet*, 2020 WL 6686120, at *9-10. Accordingly, the Court will only consider whether Individual Plaintiffs have standing under their vote-denial theory.

⁵¹ In the interest of comprehensiveness, the Court also addresses whether the Trump Campaign has associational standing.

A. Voters

1. Injury in Fact

Individual Plaintiffs have adequately demonstrated that they suffered an injury-in-fact. “[A] person’s right to vote is ‘individual and personal in nature.’”⁵² Accordingly, the denial of a person’s right to vote is typically always sufficiently concrete and particularized to establish a cognizable injury.⁵³ This is true regardless of whether such a harm is widely shared.⁵⁴ So long as an injury is concrete, courts will find that an injury in fact exists despite the fact that such harm is felt by many.⁵⁵

This is precisely the situation presented here. Individual Plaintiffs have adequately pled that their votes were denied. As discussed above, the denial of a vote is a highly personal and concrete injury. That Individual Plaintiffs had their ballots cancelled and thus invalidated is sufficiently personal to establish an injury in fact. It is of no matter that many persons across the state might also have had their votes invalidated due to their county’s failure to implement a curing

⁵² *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

⁵³ *See Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J.) (noting the distinction between injuries caused by outright denial of the right to vote versus those caused by reducing the weight or power of an individual’s vote). The Court notes that much of standing doctrine as it relates to voting rights arises from gerrymandering or vote-dilution cases, which often involve relatively abstract harms. *See, e.g., Gill*, 138 S. Ct.; *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964)).

⁵⁴ *See Federal Elections Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (citing *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449-50 (1989)).

⁵⁵ *See id.* (“[W]here a harm is concrete, though widely shared, the [United States Supreme] Court has found ‘injury in fact.’”) (quoting *Public Citizen*, 491 U.S. at 449-50).

procedure. Accordingly, the Court finds that Individual Plaintiffs have established injury in fact.

2. Causation

However, Individual Plaintiffs fail to establish that Defendant Counties or Secretary Boockvar actually caused their injuries. First, Defendant Counties, by Plaintiffs' own pleadings, had nothing to do with the denial of Individual Plaintiffs' ability to vote. Individual Plaintiffs' ballots were rejected by Lancaster and Fayette Counties, neither of which is a party to this case. None of Defendant Counties received, reviewed, or discarded Individual Plaintiffs' ballots. Even assuming that Defendant Counties unconstitutionally allowed *other* voters to cure their ballots, that alone cannot confer standing on Plaintiffs who seek to challenge the denial of *their* votes.

Second, Individual Plaintiffs have not shown that their purported injuries are fairly traceable to Secretary Boockvar. Individual Plaintiffs have entirely failed to establish any causal relationship between Secretary Boockvar and the cancellation of their votes. The only connection the Individual Plaintiffs even attempt to draw is that Secretary Boockvar sent an email on November 2, 2020 to some number of counties, encouraging them to adopt a notice-and-cure policy. However, they fail to allege which counties received this email or what information was specifically included therein. Further, that this email encouraged counties to adopt a notice-and-cure policy does not suggest in any way that Secretary Boockvar intended or

desired Individual Plaintiffs’ votes to be cancelled. To the contrary, this email suggests that Secretary Boockvar encouraged counties to allow exactly these types of votes to be counted. Without more, this Court cannot conclude that Individual Plaintiffs have sufficiently established that their injuries are fairly traceable to Secretary Boockvar.⁵⁶

3. Redressability

In large part because the Individual Plaintiffs cannot establish that their injury is “fairly traceable” to the Defendants’ conduct, they also cannot show that their injury could be redressed by a favorable decision from this Court.⁵⁷ Beyond that substantial hurdle, however, a review of the injury alleged and the relief sought plainly shows that the Individual Plaintiffs’ injury would not be redressable. The Individual Plaintiffs base their equal-protection claim on the theory that their

⁵⁶ The Third Circuit has held that a party may have standing “to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government’s action.” *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014) (quoting *Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91, 116 (D.D.C. 2013)). But in that case, standing was permitted to avoid a catch-22 situation where, absent standing against a third-party government actor, a plaintiff would not be able to bring suit against any responsible party. *Id.* at 367. Here, Plaintiffs allege that Secretary Boockvar is responsible for authorizing the unconstitutional actions of Defendant Counties. However, unlike the plaintiffs in *Aichele*, Plaintiffs are able to sue Defendant Counties for their allegedly unconstitutional actions. Moreover, because this Court has already concluded that Plaintiffs lack standing to sue Defendant Counties for their use of the notice-and-cure policy, it would be counterintuitive for Plaintiffs to have standing to challenge Secretary Boockvar’s authorization of this policy, which is even further removed from any purported harm that Individual Plaintiffs have suffered.

⁵⁷ See, e.g., *Newdow v. Roberts*, 603 F.3d 1002, 1011 (D.C. Cir. 2010) (noting that when an injury is caused by a third party not before the Court, courts cannot “redress injury . . . that results from [such] independent action.”) (ellipses and alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

right to vote was denied. Their prayer for relief seeks, in pertinent part: (1) an order, declaration, or injunction from this Court prohibiting the Defendants from certifying the results of the 2020 General Election in Pennsylvania on a Commonwealth-wide basis; and (2) another order prohibiting Defendants from certifying the results which include ballots the Defendants permitted to be cured.

Neither of these orders would redress the injury the Individual Plaintiffs allege they have suffered. Prohibiting certification of the election results would not reinstate the Individual Plaintiffs' right to vote. It would simply deny more than 6.8 million people *their* right to vote. "Standing is measured based on the theory of harm and the specific relief requested."⁵⁸ It is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."⁵⁹ Here, the answer to invalidated ballots is not to invalidate millions more. Accordingly, Plaintiffs have not shown that their injury would be redressed by the relief sought.

B. Trump Campaign

The standing inquiry as to the Trump Campaign is particularly nebulous because neither in the FAC nor in its briefing does the Trump Campaign clearly assert what its alleged injury is. Instead, the Court was required to embark on an

⁵⁸ *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *37 (W.D. Pa. Oct. 10, 2020) (citing *Gill*, 138 S. Ct. at 1934).

⁵⁹ *Gill*, 138 S. Ct. at 1934 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006)).

extensive project of examining almost every case cited to by Plaintiffs to piece together the theory of standing as to this Plaintiff – the Trump Campaign.

The Trump Campaign first posits that “as a political committee for a federal candidate,” it has “Article III standing to bring this action.”⁶⁰ On its face, this claim is incorrect. Simply being a political committee does not obviate the need for an injury-in-fact, nor does it automatically satisfy the other two elements of standing.

For this proposition, the Trump Campaign relies on two federal cases where courts found associational standing by a political party’s state committee. Therefore, the Court considers whether the Trump Campaign can raise associational standing, but finds that those cases are inapposite.⁶¹ First, a candidate’s political committee and a political party’s state committee are not the same thing. Second, while the doctrine of associational standing is well established, the Trump Campaign overlooks a particularly relevant, very recent decision from another federal court – one where the Trump Campaign itself argued that it had associational standing. In *Donald J. Trump for President, Inc. v. Cegavske*,⁶² the Trump Campaign asserted associational standing, and that court rejected this theory.

⁶⁰ Doc. 170 at 11.

⁶¹ *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006); *Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983).

⁶² No. 2:20-CV-1445, 2020 WL 5626974 (D. Nev. Sept. 18, 2020).

Associational standing allows an entity to bring suit on behalf of members upon a showing that: (1) “its members would otherwise have standing to sue in their own right;” (2) “the interests it seeks to protect are germane to the organization's purpose;” and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”⁶³

In *Cegavske* (another case in which the Trump Campaign alleged violations of equal protection), the court found that the Trump Campaign failed to satisfy the second prong of associational standing because it “represents only Donald J. Trump and his ‘electoral and political goals’ of reelection.”⁶⁴ That court noted that while the Trump Campaign might achieve its purposes through its member voters, the “constitutional interests of those voters are wholly distinct” from that of the Trump Campaign.⁶⁵ No different here. Even if the Individual Plaintiffs attempted to vote for President Trump, their constitutional interests are different, precluding a finding of associational standing. In any event, because the Individual Plaintiffs lack standing in this case, the Trump Campaign cannot satisfy the first prong of associational standing either.

The Trump Campaign’s second theory is that it has “‘competitive standing’ based upon disparate state action leading to the ‘potential loss of an election.’”⁶⁶

⁶³ *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977).

⁶⁴ *Cegavske*, 2020 WL 5626974 at *4 (internal citations omitted).

⁶⁵ *Id.*

⁶⁶ Doc. 170 at 11 (citing *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)).

Pointing to a case from the United States Court of Appeals for the Ninth Circuit, *Drake v. Obama*,⁶⁷ the Trump Campaign claims this theory proves injury-in-fact. First, the Court finds it important to emphasize that the term “competitive standing” has specific meaning in this context. Second, the Trump Campaign’s reliance on the theory of competitive standing under *Drake v. Obama* is, at best, misguided. Subsequent case law from the Ninth Circuit has explained that competitive standing “is the notion that ‘a candidate or his political party has standing to challenge the *inclusion of an allegedly ineligible rival on the ballot*, on the theory that doing so hurts the candidate’s or party’s own chances of prevailing in the election.’”⁶⁸ In the present matter, there is no allegation that the Democratic Party’s candidate for President, or any other candidate, was ineligible to appear on the ballot.

Examination of the other case law cited to by Plaintiffs contradicts their theory that competitive standing is applicable here for the same reason. For example, in *Texas Democratic Party v. Benkiser*, the United States Court of Appeals for the Fifth Circuit found competitive standing in a case in which the Democratic Party petitioned against the decision to deem a candidate ineligible and

⁶⁷ 664 F.3d.

⁶⁸ *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013) (emphasis added) (quoting *Drake*, 664 F.3d at 782); *see also Mecinas v. Hobbs*, No. CV-19-05547, 2020 WL 3472552, at *11-12 (D. Ariz. June 25, 2020) (explaining the current state of the doctrine of competitive standing and collecting cases).

replace him with another.⁶⁹ Likewise, in *Schulz v. Williams*, the United States Court of Appeals for the Second Circuit found competitive standing where the Conservative party alleged an injury in fact by arguing that a candidate from the Libertarian Party of New York was improperly placed on the ballot for the Governor's race in 1994.⁷⁰ By way of yet another example, Plaintiffs' citation to *Fulani v. Hogsett* makes the same point; competitive standing applies to challenges regarding the eligibility of a candidate. There, the Indiana Secretary of State was required to certify the names of candidates for President by a certain date.⁷¹ When the Secretary failed to certify the Democratic and Republican candidates by that date, the New Alliance party challenged the inclusion of those candidates on the ballot, arguing that allowing these ineligible candidates constituted an injury-in-fact.⁷² Three other cases relied on by Plaintiffs illustrate separate grounds for stating an injury in fact, all still relating to ballot provisions.⁷³

It is telling that the only case from the Third Circuit cited to by Plaintiffs, *Marks v. Stinson*, does not contain a discussion of competitive standing or any other theory of standing applicable in federal court.⁷⁴ Simply pointing to another

⁶⁹ 459 F.3d at 586.

⁷⁰ 44 F.3d 48, 53 (2d Cir. 1994).

⁷¹ 917 F.2d 1028, 1029-30 (7th Cir. 1990).

⁷² *Id.*

⁷³ See *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 542-43 (6th Cir. 2014) (finding that Plaintiffs had standing to challenge Tennessee's *ballot-access* laws); see also *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (finding that Plaintiffs had standing to challenge the *ballot-ordering* provision in Minnesota); *Nelson v. Warner*, No. 3:19-0898, 2020 WL 4582414, at *3 (S.D. W. Va. Aug. 10, 2020) (same).

⁷⁴ 19 F.3d 873 (3d Cir. 1994).

case where a competitor in an election was found to have standing does not establish *competitive standing* in this matter. Without more, this Court declines to take such an expansive view of the theory of competitive standing, particularly given the abundance of guidance from other Circuits, based on Plaintiffs’ own citations, limiting the use of this doctrine.

The Trump Campaign has not offered another theory of standing, and therefore, cannot meet its burden of establishing Article III jurisdiction. To be clear, this Court is not holding that a political campaign can never establish standing to challenge the outcome of an election; rather, it merely finds that in this case, the Trump Campaign has not pled a cognizable theory.⁷⁵

IV. MOTION TO DISMISS 12(b)(6)

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), the Court dismisses a complaint, in whole or in part, if the plaintiff has failed to “state a claim upon which relief can be granted.” A motion to dismiss “tests the legal sufficiency of a claim”⁷⁶ and “streamlines litigation by dispensing with needless discovery and factfinding.”⁷⁷ “Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of

⁷⁵ Even assuming, however, that the Trump Campaign could establish that element of standing, it would still fail to satisfy the causation and redressability requirements for the same reasons that the Voter Plaintiffs do. To the extent the Trump Campaign alleges any injury at all, its injury is attenuated from the actions challenged.

⁷⁶ *Richardson v. Bledsoe*, 829 F.3d 273, 289 n. 13 (3d Cir. 2016) (Smith, C.J.) (*citing Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (Easterbrook, J.)).

⁷⁷ *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

a dispositive issue of law.”⁷⁸ This is true of any claim, “without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.”⁷⁹

Following the Roberts Court’s “civil procedure revival,”⁸⁰ the landmark decisions of *Bell Atlantic Corporation v. Twombly*⁸¹ and *Ashcroft v. Iqbal*⁸² tightened the standard that district courts must apply to 12(b)(6) motions.⁸³ These cases “retired” the lenient “no-set-of-facts test” set forth in *Conley v. Gibson* and replaced it with a more exacting “plausibility” standard.⁸⁴

Accordingly, after *Twombly* and *Iqbal*, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”⁸⁵ “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁸⁶ “Although the plausibility standard does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted

⁷⁸ *Id.* at 326 (internal citations omitted).

⁷⁹ *Id.* at 327.

⁸⁰ Howard M. Wasserman, The Roberts Court and the Civil Procedure Revival, 31 Rev. Litig. 313, 316, 319-20 (2012).

⁸¹ 550 U.S. 544 (2007).

⁸² 556 U.S. 662 (2009).

⁸³ *Id.* at 670.

⁸⁴ *Id.*

⁸⁵ *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570).

⁸⁶ *Id.*

unlawfully.”⁸⁷ Moreover, “[a]sking for plausible grounds . . . calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [wrongdoing].”⁸⁸

The plausibility determination is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁸⁹ No matter the context, however, “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”⁹⁰

When disposing of a motion to dismiss, the Court “accept[s] as true all factual allegations in the complaint and draw[s] all inferences from the facts alleged in the light most favorable to [the plaintiff].”⁹¹ However, “the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions.”⁹² “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁹³

As a matter of procedure, the Third Circuit has instructed that:

Under the pleading regime established by *Twombly* and *Iqbal*, a court reviewing the sufficiency of a complaint must take three steps. First, it

⁸⁷ *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (Jordan, J.) (internal quotations and citations omitted).

⁸⁸ *Twombly*, 550 U.S. at 556.

⁸⁹ *Iqbal*, 556 U.S. at 679.

⁹⁰ *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557).

⁹¹ *Phillips v. County. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) (Nygaard, J.).

⁹² *Iqbal*, 556 U.S. at 678;

⁹³ *Id.* (citing *Twombly*, 550 U.S. at 555); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (Nygaard, J.) (“After *Iqbal*, it is clear that conclusory or ‘bare-bones’ allegations will no longer survive a motion to dismiss.”).

must tak[e] note of the elements [the] plaintiff must plead to state a claim. Second, it should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, [w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.⁹⁴

B. Equal Protection

Even if Plaintiffs had standing, they fail to state an equal-protection claim.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁹⁵ The principle of equal protection is fundamental to our legal system because, at its core, it protects the People from arbitrary discrimination at the hands of the State.

But, contrary to Plaintiffs’ assertions, not all “unequal treatment” requires Court intervention.⁹⁶ The Equal Protection Clause “does not forbid classifications.”⁹⁷ It simply keeps governmental decisionmakers from treating similarly situated persons differently.⁹⁸ The government could not function if complete equality were required in all situations. Consequently, a classification resulting in “some inequality” will be upheld unless it is based on an inherently suspect characteristic or “jeopardizes the exercise of a fundamental right.”⁹⁹

⁹⁴ *Connelly*, 809 F.3d at 787 (internal quotations and citations omitted).

⁹⁵ U.S. Const. Amend. XIV, cl. 1.

⁹⁶ Doc. 170 at 29.

⁹⁷ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

⁹⁸ *Id.* (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

⁹⁹ *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

One such fundamental right, at issue in this case, is the right to vote. Voting is one of the foundational building blocks of our democratic society, and that the Constitution firmly protects this right is “indelibly clear.”¹⁰⁰ All citizens of the United States have a constitutionally protected right to vote.¹⁰¹ And all citizens have a constitutionally protected right to have their votes counted.¹⁰²

With these background principles firmly rooted, the Court turns to the merits of Plaintiffs’ equal-protection claims. The general gist of their claims is that Secretary Boockvar, by failing to prohibit counties from implementing a notice-and-cure policy, and Defendant Counties, by adopting such a policy, have created a “standardless” system and thus unconstitutionally discriminated against Individual Plaintiffs. Though Plaintiffs do not articulate why, they also assert that this has unconstitutionally discriminated against the Trump Campaign.

As discussed above, the Court will address Individual Plaintiffs’ and the Trump Campaign’s claims separately. Because Individual Plaintiffs premised standing on the purported wrongful cancellation of their votes, the Court will only analyze whether Defendants have impermissibly burdened Individual Plaintiffs’ ability to vote. Further, the Court will consider two issues raised by the Trump Campaign; the first being whether it has stated a valid claim alleging discrimination relating to its use of poll-watchers, and the second being whether

¹⁰⁰ *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

¹⁰¹ *Id.* (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884)).

¹⁰² *Id.* (citing *United States v. Mosley*, 238 U.S. 383 (1915)).

the General Assembly’s failure to uniformly prohibit (or permit) the notice-and-cure procedure is unconstitutional.

1. Individual Plaintiffs

States have “broad authority to regulate the conduct of elections, including federal ones.”¹⁰³ “This authority includes ‘broad powers to determine the conditions under which the right of suffrage may be exercised.’”¹⁰⁴ Because states must have freedom to regulate elections if “some sort of order, rather than chaos, is to accompany the democratic processes,”¹⁰⁵ such regulation is generally insulated from the stringent requirements of strict scrutiny.¹⁰⁶

Instead, state regulation that burdens voting rights is normally subject to the *Anderson-Burdick* balancing test, which requires that a court “weigh the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”¹⁰⁷ Under this test, “any ‘law respecting the right to vote – whether it governs voter qualifications, candidate selection, or the voting process,’ is subjected to ‘a deferential ‘important

¹⁰³ *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (citing U.S. Const. Art. I, § 4, cl. 1).

¹⁰⁴ *Donald J. Trump for President, Inc.*, 2020 WL 5997680, at *38 (quoting *Shelby County, Ala. v. Holder*, 570 U.S. 529, 543 (2013)).

¹⁰⁵ *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

¹⁰⁶ *Burdick*, 504 U.S. at 432-33.

¹⁰⁷ *Crawford v. Marion County Election Board*, 553 U.S. 181, 190 (2008) (quoting *Burdick*, 504 U.S. at 434).

regulatory interests” standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.”¹⁰⁸

The *Anderson-Burdick* balancing test operates on a sliding scale.¹⁰⁹ Thus, more restrictive laws are subject to greater scrutiny. Conversely, “minimally burdensome and nondiscriminatory” regulations are subject to “a level of scrutiny ‘closer to rational basis.’”¹¹⁰ “And where the state imposes no burden on the ‘right to vote’ at all, true rational basis review applies.”¹¹¹

Here, because Defendants’ conduct “imposes no burden” on Individual Plaintiffs’ right to vote, their equal-protection claim is subject to rational basis review.¹¹² Defendant Counties, by implementing a notice-and-cure procedure, have in fact *lifted* a burden on the right to vote, even if only for those who live in those counties. Expanding the right to vote for some residents of a state does not burden the rights of others.¹¹³ And Plaintiffs’ claim cannot stand to the extent that it complains that “the state is *not* imposing a restriction on *someone else’s* right to vote.”¹¹⁴ Accordingly, Defendant Counties’ use of the notice-and-cure procedure

¹⁰⁸ *Donald J. Trump for President*, 2020 WL 5997680, at *39 (quoting *Crawford*, 533 U.S. at 204 (Scalia, J. concurring)).

¹⁰⁹ *See id.* at *40; *see also Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019); *Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020).

¹¹⁰ *Donald J. Trump for President*, 2020 WL 5997680, at *39 (quoting *Ohio Council 8 Am. Fed’n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016)).

¹¹¹ *Id.* (citing *Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004)).

¹¹² Even after questioning from this Court during oral argument regarding the appropriate standard of review for their equal-protection claim, Plaintiffs failed to discuss this key aspect of the claim in briefing. *See* Doc. 170.

¹¹³ *See, e.g., Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018).

¹¹⁴ *Donald J. Trump for President*, 2020 WL 5997680, at *44 (emphasis in original).

(as well as Secretary Boockvar’s authorization of this procedure) will be upheld unless it has no rational basis.¹¹⁵

Individual Plaintiffs’ claims fail because it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots. Though states may not discriminatorily sanction procedures that are likely to burden some persons’ right to vote more than others, they need not expand the right to vote in perfect uniformity. All Plaintiffs have alleged is that Secretary Boockvar allowed counties to choose whether or not they wished to use the notice-and-cure procedure. No county was forced to adopt notice-and-cure; each county made a choice to do so, or not. Because it is not irrational or arbitrary for a state to allow counties to expand the right to vote if they so choose, Individual Plaintiffs fail to state an equal-protection claim.

Moreover, even if they could state a valid claim, the Court could not grant Plaintiffs the relief they seek. Crucially, Plaintiffs fail to understand the relationship between right and remedy. Though every injury must have its proper redress,¹¹⁶ a court may not prescribe a remedy unhinged from the underlying right being asserted.¹¹⁷ By seeking injunctive relief preventing certification of the Pennsylvania election results, Plaintiffs ask this Court to do exactly that. Even

¹¹⁵ *Biener*, 361 F.3d at 215.

¹¹⁶ *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

¹¹⁷ *Gill*, 138 S. Ct. at 1934 (“A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”) (citing *Cuno*, 547 U.S. at 353).

assuming that they can establish that their right to vote has been denied, which they cannot, Plaintiffs seek to remedy the denial of their votes by invalidating the votes of millions of others. Rather than requesting that their votes be counted, they seek to discredit scores of other votes, but only for one race.¹¹⁸ This is simply not how the Constitution works.

When remedying an equal-protection violation, a court may either “level up” or “level down.”¹¹⁹ This means that a court may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing that person on par with others who already enjoy the right,¹²⁰ or a court may level down by withdrawing the benefit from those who currently possess it.¹²¹ Generally, “the preferred rule in a typical case is to extend favorable treatment” and to level up.¹²² In fact, leveling down is impermissible where the withdrawal of a benefit would necessarily violate the Constitution.¹²³ Such would be the case if a court were to remedy discrimination by striking down a benefit that is constitutionally guaranteed.

¹¹⁸ Curiously, Plaintiffs now claim that they seek only to enjoin certification of the presidential election results. Doc. 183 at 1. They suggest that their requested relief would thus not interfere with other election results in the state. But even if it were logically possible to hold Pennsylvania’s electoral system both constitutional and unconstitutional at the same time, the Court would not do so.

¹¹⁹ *Heckler v. Matthews*, 465 U.S. 728, 740 (1984) (internal citations omitted).

¹²⁰ *Id.* at 741; *Califano v. Westcott*, 443 U.S. 76, 90-91 (1979).

¹²¹ *E.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017).

¹²² *Id.* (internal citations omitted).

¹²³ *See Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971) (addressing whether a city’s decision to close pools to remedy racial discrimination violated the Thirteenth Amendment); *see also Reynolds*, 377 U.S. at 554 (citing *Mosley*, 238 U.S. at 383).

Here, leveling up to address the alleged cancellation of Plaintiffs’ votes would be easy; the simple answer is that their votes would be counted. But Plaintiffs do not ask to level up. Rather, they seek to level down, and in doing so, they ask the Court to violate the rights of over 6.8 million Americans. It is not in the power of this Court to violate the Constitution.¹²⁴ “The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.”¹²⁵ “To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”¹²⁶

Granting Plaintiffs’ requested relief would necessarily require invalidating the ballots of every person who voted in Pennsylvania. Because this Court has no authority to take away the right to vote of even a single person, let alone millions of citizens, it cannot grant Plaintiffs’ requested relief.

2. Trump Campaign

Plaintiffs’ brief in opposition to the motions to dismiss spends only *one* paragraph discussing the merits of its equal-protection claim. Plaintiffs raise two arguments as to how equal protection was violated. The first is that “Defendants excluded Republican/Trump observers from the canvass so that they would not

¹²⁴ *Marbury*, 5 U.S. at 147.

¹²⁵ *Perles v. County Return Bd. of Northumberland County*, 202 A.2d 538, 540 (Pa. 1964) (cleaned up).

¹²⁶ *Id.* at 567.

observe election law violations.”¹²⁷ The second claims that the “use of notice/cure procedures violated equal protection because it was deliberately done in counties where defendants knew that mail ballots would favor Biden/Democrats.”¹²⁸ The former finds no support in the operative pleading, and neither states an equal-protection violation.

Count I of the FAC makes no mention of disparity in treatment of observers based on which campaign they represented. Instead, Count I discusses the use of “standardless” procedures. These are two separate theories of an equal protection violation. That deficiency aside, to the extent this new theory is even pled, Plaintiffs fail to plausibly plead that there was “uneven treatment” of Trump and Biden watchers and representatives. Paragraphs 132-143 of the FAC are devoted to this alleged disparity. None of these paragraphs support Plaintiffs’ argument. A selection below:

- “Defendants have not allowed *watchers and representatives* to be present . . .”¹²⁹
- “In Centre County, the central pre-canvassing location was a large ballroom. The set-up was such that the *poll watchers did not have meaningful access* to observe the canvassing and tabulation process of mail-in and absentee ballots, and in fact, the *poll watchers and observers* who were present could not actually observe the ballots such that they could confirm or object to the validity of the ballots.”¹³⁰

¹²⁷ Doc. 170 at 29. Count I makes no mention of the poll-watching allegations, nor does it seek relief for any violation of law on the basis of those allegations. Out of an abundance of caution, however, the Court considers whether these allegations state a claim.

¹²⁸ *Id.*

¹²⁹ Doc. 125 at ¶ 134 (emphasis added).

¹³⁰ *Id.* at ¶ 135 (emphasis added).

- “In Philadelphia County, *poll watchers and canvass representatives* were denied access altogether in some instances.”¹³¹
- “In Delaware County, *observers* were denied access to a back room counting area . . .”¹³²

None of these allegations (or the others in this section) claim that the Trump Campaign’s watchers were treated *differently* than the Biden campaign’s watchers. Simply alleging that poll watchers did not have access or were denied access to some areas does not plausibly plead unequal treatment. Without actually alleging that one group was treated differently than another, Plaintiffs’ first argument falls flat.

Likewise, Plaintiffs cannot salvage their notice-and-cure theory by invoking *Bush v. Gore*.¹³³ Plaintiffs claim that the Equal Protection clause “imposes a ‘minimum requirement for nonarbitrary treatment of voters’ and forbids voting systems and practices that distribute resources in ‘standardless’ fashion, without ‘specific rules designed to ensure uniform treatment.’”¹³⁴ Plaintiffs attempt to craft a legal theory from *Bush*, but they fail because: (1) they misapprehend the issues at play in that case; and (2) the facts of this case are distinguishable.

Plaintiffs’ interpretation of *Bush v. Gore* would broaden the application of that case far beyond what the Supreme Court of the United States endorsed. In *Bush*, the Supreme Court stopped a recount of votes in Florida in the aftermath of

¹³¹ *Id.* at ¶ 136 (emphasis added).

¹³² *Id.* at ¶ 137 (emphasis added).

¹³³ 531 U.S. 98 (2000).

¹³⁴ Doc. 170 at 13.

the 2000 Presidential Election. Despite Plaintiffs’ assertions, *Bush* does not stand for the proposition that every rule or system must ensure uniform treatment. In fact, the Supreme Court explicitly said so, explaining: “[t]he question before the Court is *not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”¹³⁵ Instead, the Court explained that its holding concerned a “situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.”¹³⁶ Where a state court has ordered such a remedy, the Supreme Court held that “there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.”¹³⁷ In other words, the lack of guidance from a court constituted an equal-protection violation.

In the instant matter, Plaintiffs are not challenging any court action as a violation of equal protection, and they do not allege that Secretary Boockvar’s guidance differed from county to county, or that Secretary Boockvar told some counties to cure ballots and others not to. That some counties may have chosen to implement the guidance (or not), or to implement it differently, does not constitute an equal-protection violation. “[M]any courts that have recognized that counties may, consistent with equal protection, employ entirely different election

¹³⁵ *Bush*, 531 U.S. at 109 (emphasis added).

¹³⁶ *Id.*

¹³⁷ *Id.*

procedures and voting systems within a single state.”¹³⁸ “Arguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected, just as judges in sentencing-guidelines cases apply uniform standards with arguably different results.”¹³⁹ Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations.

V. CONCLUSION

Defendants’ motions to dismiss the First Amended Complaint are granted with prejudice. Leave to amend is denied. “Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility.”¹⁴⁰ Given that: (1) Plaintiffs have already amended once as of right; (2) Plaintiffs seek to amend simply in order to effectively reinstate their initial complaint and claims; and (3) the deadline for counties in Pennsylvania to certify their election results to Secretary Boockvar is November 23, 2020, amendment would unduly delay resolution of the issues. This is especially true because the Court would need to implement a new briefing schedule, conduct a second oral argument, and then decide the issues.

¹³⁸ *Donald J. Trump for President*, 2020 WL 5997680, at *44.

¹³⁹ *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2020).

¹⁴⁰ *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413–14 (3d Cir.1993).

An appropriate Order follows.

BY THE COURT:

s/ Matthew W. Brann

Matthew W. Brann

United States District Judge

Exhibit 12

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR
PRESIDENT, INC., *et al.*,

Plaintiffs,

v.

KATHY BOOCKVAR, *et al.*,

Defendants.

No. 4:20-CV-02078

(Judge Brann)

ORDER

AND NOW, this 21st day of November 2020, in accordance with the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED** that:

1. Defendants' motions to dismiss the First Amended Complaint (Docs. 127, 135, 140, 145, 161, and 165) are **GRANTED WITH PREJUDICE. NO LEAVE TO AMEND IS GRANTED.**
2. Defendants' motions to dismiss the original complaint (Docs. 81, 85, 90, 92, 96, and 98) are **DENIED AS MOOT.**
3. Plaintiffs' motion for leave to file a second amended complaint (Doc. 172) is **DENIED AS MOOT.**
4. Plaintiffs' motions for preliminary injunction (Docs. 89 and 182) are **DENIED AS MOOT.**
5. Plaintiffs' motions regarding discovery (Docs. 118 and 171) are **DENIED AS MOOT.**

6. Further motions regarding amicus briefing and intervention (Docs. 166, 180, and 200) are **DENIED AS MOOT**.
7. The case is dismissed and the Clerk of Court is directed to close the case file.

BY THE COURT:

s/ Matthew W. Brann

Matthew W. Brann
United States District Judge